CLERK'S COPY.

1142

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. 243

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

F. W. FITCH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 29, 1939
CERTIORARI GRANTED OCTOBER 9, 1939

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,306

TAX REVIEW.

F. W. FITCH, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

ON PETITION TO REVIEW DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

FILED SEPTEMBER 8, 1938.

INDEX.

193861—39

a (Order Extending Time to File Record to September 1, 1938.)

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner of Internal Revenue, Respondent.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to September 1, 1938.

C. R. ARUNDELL,
Member.

Dated: Wash. D. C.
July 11, 1938.

j

Now, Aug. 29, 1938, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed): Filed in the U. S. Circuit Court of Appeals, Eighth Circuit, on September 8, 1938, E. E. Koch, Clerk.

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1 (Docket Entries.)

F. W. Fitch, Petitioner,
Docket No. 84748 vs.
Commissioner of Internal Revenue, Respondent.

Appearances:

For Taxpayer: Arnold F. Schaetzle, Esq.

For Commr'r.: H. D. Thomas, Esq., H. A. Melville, Esq.
Transferred to Mr. Sternhagen 12/14/37.

1936

May 26—Petition received and filed. Taxpayer notified. (Fee paid.)

May 26—Copy of petition served on General Counsel.

July 16—Answer filed by General Counsel.

July 21—Copy of answer served on taxpayer.

1937

Feb. 27—Hearing set week of 5/3/37, Des Moines, Iowa.

May 5—Hearing had before Mr. Miller, Div. 16, on merits. Submitted. Stipulation of facts filed. Pet's brief due 6/20/37; Commissioner's brief due 7/20/37; Pet's reply due 8/5/37.

May 27—Transcript of hearing of 5/5/37 filed.

June 18—Brief filed by taxpayer. 6/19/37 copy served on General Counsel.

Sept. 8—Motion for leave to file brief, brief lodged, filed by General Counsel. 9/9/37 Granted.

Oct. 2—Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 10/6/37 Granted.

Oct. 8—Copy of motion and reply brief served on General Counsel.

1938

Jan. 12—Memorandum Findings of Fact and Opinion rendered, John W. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

Feb. 12—Recomputation of deficiency filed by General Counsel.

Feb. 16—Hearing set March 9, 1938, on settlement under Rule 50.

Feb. 16—Hearing had before Mr. Van Fossan, on settlement under Rule 50. Not contested. Referred to Mr. Sternhagen for decision.

Mar. 10—Judgment entered, John M. Sternhagen, Div. 10.

May 24—Petition for review by United States Circuit Court of Appeals, Eighth Circuit, with assignments of error filed by taxpayer.

2 May 24—Proof of service filed.

July 11—Praecipe for record filed by taxpayer.

July 11—Motion for extension of time to Sept. 1, 1938 to prepare and transmit the record filed by taxpayer.

July 11—Order extending time to Sept. 1, 1938 for preparation of evidence and delivery of record, entered.

July 14—Agreement to praecipe filed.

July 14—Proof of service of praecipe filed.

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3 (Petition of F. W. Fitch for Appeal.)

Filed May 26, 1936, United States Board of Tax Appeals.

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748 vs.
Commissioner of Internal Revenue, Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency IT:AR:D-2, ELA-90D, dated March 3, 1936, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual, citizen and resident of Des Moines, Iowa, his address being 15th and Walnut Streets, of this City.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A), was mailed to the petitioner on March 3, 1936.

3. The taxes in controversy are income taxes for the calendar year 1933 and are in the sum of $1,967.26.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

4 (a) The respondent erred by adding to the income of petitioner 60% of the income from the F. W. and Lettie S. Fitch Trust, in the sum of $7,128.00.

(b) The respondent erred in adding to income of petitioner, income taxes in the sum of $5,146.10 paid by The F. W. Fitch Company, a corporation, for and on behalf of the petitioner.

(c) The respondent erred by adding to income of the petitioner the sum of $208.82 representing attorney fees paid by The F. W. Fitch Company for and on behalf of the petitioner.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On April 23, 1923, the petitioner, together with his wife, Lettie S. Fitch, conveyed a factory building to the Bankers Trust Company, of Des Moines, Iowa, trustee. On this same date a declaration of trust respecting said property was duly declared and executed. Under the terms of a lease entered into by The F. W. Fitch Company, a corporation, lessee and F. W. Fitch, lessor, on the 1st day of April 1923, which lease was duly assigned to the trustee above named. The F. W. Fitch Company pays an annual rental of $12,000.00 per year to said trustee for the use of the premises. The lease is for a term of 99 years. Under the terms of said declaration of trust the petitioner receives 40% of the income of said trust and Lettie S. Fitch receives 60%. Said trust is irrevocable. This trust was not made in contempla-
5 tion of a divorce between the petitioner and the said
Lettie S. Fitch and no divorce proceedings of any kind were pending at the time of the execution of the assignment. It is true that about two years after the trust was executed the parties did become involved in divorce litigation in Polk County, Iowa. A decree of divorce was duly entered by the Polk County, Iowa District Court on December 17, 1925, and under its terms a separate property settlement, independent of the Court, was negotiated between the parties. The Court approved the settlement which was made and it likewise approved the trust which had been declared on April 23, 1923. However, the trust at the time of its creation was not an alimony trust and since it was irrevocable and by its terms unchangeable it was not affected by the subsequent divorce decree.

(b) The petitioner is president of The F. W. Fitch Company, an Iowa corporation. During the year under review the corporation paid income taxes in the sum of $5,146.10 for the petitioner and on its book of account charged the amount to surplus. The item has not been allowed by the respondent as a deduction to the corporation and it there-

fore is not compensation to the petitioner. The item is not a dividend to the petitioner. Payment of this item by the corporation merely created a debt owing by the petitioner to said corporation and as such it is not income to him. The corporation charged the item to surplus in error. It
6 should have been charged to petitioner's account.

(c) As in the case of item b above, The F. W. Fitch Company paid attorney fees in the sum of $208.82 on behalf of the petitioner. This item has not been allowed, by the respondent, as a deduction to the corporation. It also is a debt owing by the petitioner to the corporation and as such is not income to him. In any event the item represents deductible legal expense to the petitioner and if taken up as income to him it should be allowed as a deduetion to him.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that the following items should be eliminated from the respondent's computation of taxable net income:

(a) The sum of $7,128.00 representing 60% of trust income paid to Lettie S. Fitch.

(b) The sum of $5,146.10 representing income taxes paid by The F. W. Fitch Company for the petitioner.

(c) The sum of $208.82 representing attorney fees paid by The F. W. Fitch Company for the petitioner.

ARNOLD F. SCHAETZLE
Counsel for Petitioner
402 Hubbell Bldg.,
Des Moines, Ia.

7 State of Iowa,
Polk County—ss.:

F. W. Fitch, being duly sworn, says that he is the petitioner named in the within and foregoing petition, that he has read the same and is familiar with the statements contained therein and the facts stated are true as he verily believes.

F. W. FITCH

Subscribed and sworn to before me this 23 day of May, 1936.

Orig. Duly Verified:

(s) EARL L. DRATH
Notary Public.

My Commission Expires July 4, 1936.
(Notary Seal)

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8 (Exhibit A.)

Treasury Department.

Washington

Office of
Commissioner of Internal Revenue

March 3, 1936.

Mr. F. W. Fitch,
15th & Walnut Streets,
Des Moines, Iowa.

Sir:

You are advised that the determination of your income tax liability for the taxable year 1933 discloses a deficiency of $1,967.26 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932 as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return (s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, which ever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By W. T. Sherwood,
Acting Deputy Commissioner.

Enclosures:

Statement
Form 870

9 Statement.

IT:AR:D-2

ELA-90D

In re: Mr. F. W. Fitch,
15th & Walnut Streets,
Des Moines, Iowa.

Income Tax Liability.

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1933	$3,513.61	$1,546.35	$1,967.26

The report of the internal revenue agent in charge at Omaha, Nebraska, a copy of which was mailed to you on January 6, 1936, has been approved with the following adjustment. Income from the F. W. and Lettie S. Fitch Trust has been held to be taxable to you as grantor. An examination of the return filed by the trust indicates that it was an alimony trust. In this connection, you are advised that the Bureau holds that income from a trust created in lieu of alimony is taxable to the husband, the grantor, for the reason that the income of the trust was used for the discharge of the grantor's personal and marital obligations.

This position is based on the following: General Counsel's Memorandum 13308, the decision of the United States Board of Tax Appeals in the case of Frank P. Welch, 12 B. T. A., page 800 and Income Tax Ruling No. 1699, Cumulative Bulletin II-1, page 52.

Net income reported		$19,045.36
Add:		
1. Amount paid for your income taxes by corporation	$5,146.10	
2. Amount paid by the corporation for attorney fees in connection with income taxes	208.82	
3. Add 60% income of trust paid to Mrs. Lettie Fitch	7,128.00	12,482.92
Total income		$31,528.28

Less:		
	Depreciation allowed	1,368.22
	Net income adjusted	$30,160.06
10	Brought Forward	$30,160.06
	Less:	
	Personal exemption	2,500.00
Balance subject to normal tax		27,660.06
Normal tax at 4% on $4,000.00		160.00
Normal tax at 8% on $23,660.06		1,892.80
Surtax on $30,160.06		1,460.81
Total tax		$3,513.61
Tax assessed, #21176		1,546.35
Deficiency		$1,967.26

Explanation of Changes.

1. An amount of $5,146.10 representing Federal income taxes for the year 1930, which was paid for you by the F. W. Fitch Company has been included as income to you.

2. A payment of $208.82 also made by the corporation for attorney fees in connection with the taxes for the year 1930.

3. The income of the trust is held to be entirely taxable to you, therefore, $7,128.00 or 60% of the net income paid to Mrs. Lettie S. Fitch has been included in your income.

Due to the fact that the expiration of the period provided in the statute of limitations will presently bar any assessment of additional tax on the return filed for the year 1933, the Income Tax Unit will be unable to afford you an opportunity to protest this determination or to be accorded a hearing prior to the mailing of this statutory notice of deficiency.

11 (Answer of Commissioner of Internal Revenue.)

Filed July 16, 1936, United States Board of Tax Appeals.

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner of Internal Revenue, Respondent.

Now comes the respondent, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition of the above-named petitioner, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the year 1933; denies the remainder of paragraph 3 of the petition.

4. Denies that the respondent erred as alleged in paragraph 4 of the petition, subparagraph (a) to (c), inclusive.

5. Denies the material allegations of fact contained in paragraph 5 of the petition, subparagraphs (a) to (c), inclusive.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

HERMAN OLIPHANT,
General Counsel for the
Department of the Treasury.

Of Counsel:

C. A. Ray, Special Attorney,
Bureau of Internal Revenue.
CAR/mpc 7-15-36

12 (Opinion of United States Board of Tax Appeals.)

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner of Internal Revenue, Respondent.

Arnold F. Schaetzle, Esq., for the petitioner.

Harold D. Thomas, Esq., for the respondent.

Memorandum Findings of Fact and Opinion.

The Commissioner determined a deficiency of $1,967.26 in petitioner's income tax for 1933 in part by adding to income an amount paid to petitioner's divorced wife from the income of a trust which he created two years prior to divorce. Petitioner contends that the trust was not created to discharge a marital obligation and that he is not taxable on its income. Other issues were settled. The case was submitted upon a stipulation.

Seal
U. S. Board of
Tax Appeals
1924.

Findings of Fact.

Petitioner, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch, to whom he was married in 1892. They lived together as husband and wife until 1917,
13 and had four children. In that year they separated. In 1919 petitioner purchased a home for his wife at a cost of $5,000, furnished it for her, and gave her an automobile. In the same year the F. W. Fitch Company was incorporated, and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1,860 were issued to petitioner and 10 to his wife, who was elected vice-president and a director of the corporation; and by reason of petitioner's control, she received from it $300 a month although she had no regular hours of employment and did not devote much time to its affairs.

On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against petitioner in the District Court of Polk County, Iowa. This suit was dismissed on April 7, 1923, after the parties had agreed upon a settlement. In accordance with the settlement, petitioner leased certain premises, owned by him, to the F. W. Fitch Company for 99 years at an annual rental of $12,000, and on

April 23, 1923, joined his wife and the Bankers Trust Company as trustee in the execution of a trust agreement, under which the lease was transferred to the trustee to hold title, collect the rents, and after the deduction of expenses to pay to Lettie S. Fitch $600 a month during her life and the remainder to petitioner during his life. Provision was made further for the trust's duration for at least 15 years and for distribution of the income to the children of petitioner and his wife in case either should die prior to the termination of the minimum period. Upon the creation of this trust, the terms of which have been and are now being substantially complied with, the wife ceased to be an officer and director of the F. W. Fitch Company, and received no
14 further payments from it.

Seal
U. S. Board of
Tax Appeals
1924

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against petitioner in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner, and praying for the custody of the child, the only one then a minor, and for a money judgment against petitioner. In his answer petitioner alleged inter alia that he had created the above trust for her benefit in settlement of the prior suit for maintenance; that

* * * She is now and was receiving this $600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner. * * *

and that

This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other.

On December 17, 1925, the court entered a decree granting the wife an absolute divorce and the custody of the minor son and further providing

* * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified

and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Seal
U. S. Board of
Tax Appeals
1924

Pursuant to this decree petitioner transferred to Lettie S. Fitch 600 common shares of the F. W. Fitch Company, which on December 31, 1925, had a book value of $77,959.80
15 and paid to her attorney the sum of $23,500, of which she received $8,500 and the balance represented counsel fees and expenses.

During 1933 the trustee under the trust of April 23, 1923, distributed to Lettie S. Fitch $7,128 which the Commissioner included in petitioner's taxable income.

Opinion.

Sternhagen: The petitioner assails the Commissioner's inclusion of this amount in his gross income of 1933. The purpose of the trust's creation and the designation of the wife as a beneficiary to the extent of $600 a month, payable out of its income, was, as shown by petitioner's answer in the divorce proceeding, the settlement of a suit begun by her for maintenance. When the trust took effect, she ceased to receive a monthly payment of $300 which she had been receiving from the corporation of which petitioner was the principal shareholder; and when in 1925 she obtained an absolute divorce, the decree ratified and affirmed the trust settlement and "the property and alimony settlement made by the parties".

Seal
U. S. Board of
Tax Appeals
1924

The trust was intended to be and unquestionably was regarded by the divorce court as being a means whereby the husband discharged his marital obligation of support. The Commissioner correctly determined that the portion of the trust income paid to the wife was in satisfaction of this obligation and was, therefore, taxable to petitioner. Douglas vs. Willcuts, 296 U. S. 1, 16 A. F. T. R. 970; Alsop vs. Commissioner, 92 Fed. (2d) 148; Helvering vs. Brooks, 82 Fed. (2d) 173, 17 A. F. T. R. 585; Commissioner vs. Hyde, 82

Fed. (2d) 174, 17 A. F. T. R. 586; John Ernest Goldring, 36 B. T. A. 779; Stephen J. Leonard, 36 B. T. A. 563;
16 Robert Glendenning, et al., Executors, 36 B. T. A. 486 (on rev. C. C. A. 3); Albert C. Whitaker, 33 B. T. A. 865, rev. disms'd. 87 Fed. (2d) 1022, 18 A. F. T. R. 865.

Enter:

Judgment will be entered under Rule 50.

Entered Jan. 12, 1938.

Seal
of U. S. Board of
Tax Appeals
1924

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17 (Order of Redetermination, March 10, 1938.)

United States Board of Tax Appeals.
Washington.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner of Internal Revenue, Respondent.

Judgment.

Subsequent to the Board's Memorandum Findings of Fact and Opinion, entered January 12, 1938, the respondent filed a proposed judgment which, after due notice, came on for hearing on March 9, 1938. No one appearing for the petitioner and no objections having been filed to the said proposed judgment, it is

Ordered, Adjudged and Decided that there is a deficiency of $1,555.58 in income tax for 1933.

Enter:

Entered Mar. 10, 1938.

(Seal
of U. S. Board of
Tax Appeals.)

JOHN M. STERNHAGEN,
Member.

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18 (Petition of F. W. Fitch for Review of Decision of United States Board of Tax Appeals.)

Filed May 24, 1938. United States Board of Tax Appeals.

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
P. T. A. Docket No. 84748 vs.
Commissioner of Internal Revenue, Respondent.

Petition for Review by the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, The Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

I.

Jurisdiction.

F. W. Fitch, your petitioner, respectfully petitions this Honorable Court to review the decision of the United States Board of Tax Appeals entered on March 10, 1938, and finding a deficiency in income tax due from your petitioner for the calendar year 1933, in the amount of $1,555.58.

Your petitioner, at the time of filing this petition, is a citizen of the United States and resides at Des Moines, Polk County, Iowa.

The return of income tax in respect of which the aforementioned tax liability arose was filed by your petitioner with the Collector of Internal Revenues for the Col-
19 lection District of Iowa located in the City of Des Moines, State of Iowa, which is located within the jurisdiction of the Circuit Court of Appeals for the Eighth Judicial Circuit.

Jurisdiction in this Court to review the decision of the United States Board of Tax Appeals aforesaid is founded on Sections 1001-3 of the Revenue Act of 1926 as amended by Sections 603 of the Revenue Act of 1928, 1101 of the Revenue Act of 1932, and 519 of the Revenue Act of 1934.

II.

Nature of Controversy.

Petitioner, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch to whom he was married in 1892. They lived together, as husband and wife, until 1917, and had four children. In that year they separated. In 1919 petitioner purchased a home for his wife at a cost of $5,000.00,

furnished it for her and gave her an automobile. In the same year the F. W. Fitch Company was incorporated and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1,860 were issued to petitioner and ten to his wife, who was elected vice-president and a director of the corporation; and by reason of petitioner's control, she received from it $300 a month, although she had no regular hours of employment and did not devote much time to its affairs.

On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against the petitioner in District Court of Polk County, Iowa. This suit was dismissed on
20 April 7, 1923 after the parties had agreed upon a settlement. In accordance with the settlement, petitioner leased certain premises owned by him, to The F. W. Fitch Company for 99 years at an annual rental of $12,000, and on April 23, 1923, joined his wife and the Bankers Trust Company, as trustee, in the execution of a trust agreement, under which the lease was transferred to the trustee to hold title, collect the rents, and after the deduction of expenses to pay to Lettie S. Fitch $600.00 a month during her life and the remainder to petitioner during his life. Provision was made further for the trust's duration for at least 15 years and for distribution of the income to the children of petitioner and his wife in case either should die prior to the termination of the minimum period. Upon the creation of this trust, the terms of which have been and are now being substantially complied with, the wife ceased to be an officer and director of The F. W. Fitch Company, and received no further payments from it.

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against petitioner in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner, and praying for the custody of the child, the only one then a minor, and for a money judgment against petitioner.

On December 17, 1925, the court entered a decree granting the wife an absolute divorce and the custody of the minor son and further providing

21 * * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Pursuant to this decree petitioner transferred to Lettie S. Fitch 600 common shares of the F. W. Fitch Company, which on December 31, 1925, had a book value of $77,959.80 and paid to her attorney the sum of $23,500, of which she received $8,500 and the balance represented counsel fees and expenses.

During 1933 the trustee under the trust of April 23, 1923, distributed to Lettie S. Fitch $7,128 which the Commissioner included in petitioner's taxable income.

The petitioner contended before the Board of Tax Appeals that the income from an irrevocable trust, created by a husband for the benefit of his wife two years before divorce proceedings are instituted, and which does not guarantee or secure recurrent payments in discharge of the marital obligation may not be regarded as taxable income to the husband. Income from the F. W. Fitch and Lettie S. Fitch Trust, said trust being an irrevocable trust, is distributable annually on the basis of 40% to petitioner and 60% to his former wife and is subject to the tax to the respective beneficiaries in said proportions under sections 161 and 162 of the Revenue Act of 1932.

Petitioner contended that during the year under review, the calendar year 1933, that no legal obligation rested upon the defendant to support his former wife and hence
22 income payable to her under an irrevocable trust, created in 1923 two years before divorce proceedings were contemplated or instituted may not be regarded as taxable income to petitioner.

Petitioner further contended that under decisions of the Supreme Court of the State of Iowa that the payment of a lump sum settlement by a husband pursuant to an absolute decree of divorce, terminates the obligation to further support the wife and completely discharges the marital obligation. Hence, when petitioner paid to his former wife the sum of $77,959.80, represented in capital stock of The F. W. Fitch Company and paid to her attorney the sum of $23,500, he completely discharged his marital obligation, and hence, during the year under review he had no such obligation to his former wife.

The Board of Tax Appeals held:

1. The trust was intended to be, and was unquestionably regarded by the divorce court as being a means whereby the husband discharged his marital obligation of support.

2. The Commissioner correctly determined that the portion of the trust income paid to the wife was in satisfaction of this obligation and was, therefore, taxable to petitioner.

III.

Assignment of Errors.

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors upon which your petitioner relies as the basis of this proceeding:

1. The Board erred in predicating its decision upon
23 a finding that the divorce court regarded an irrevocable trust, created two years prior to the entry of a divorce decree, as a means whereby petitioner discharged his marital obligation to his former wife.

2. The Board erred in holding that the income, payable directly to a wife by the trustee, under an irrevocable trust created in 1923, two years previous to an absolute decree of divorce, was properly included as taxable income to petitioner in 1933.

3. The Board erred in failing to hold that a lump sum settlement made by petitioner with his former wife upon final divorce in 1925, completely discharged the marital obligation.

4. The Board erred in holding that there was any marital obligation or legal duty upon the petitioner to support his former wife in the year under review, i. e., 1933.

5. The Board erred in holding that any part of the income of the F. W. and Lettie S. Fitch Trust, payable directly to Lettie S. Fitch was taxable income to the petitioner for 1933.

6. The Board erred in holding that there was any deficiency in income taxes due from petitioner for the year 1933.

24 Wherefore, your petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the Board to exclude from taxable net income of the petitioner for the year 1933, the sum of $7,128.00 paid directly to Lettie S. Fitch by the Trustee of the F. W. Fitch and Lettie S. Fitch Trust; and for the entry of such further orders and directions as shall by this Court be deemed meet and proper, in accordance with law.

A. F. SCHAETZLE,
Attorney for Petitioner,
402 Hubbell Bldg.,
Des Moines, Iowa.

2—11,306

State of Iowa,
County of Polk—ss.:

A. F. Schaetzle, being duly sworn, says:

I am the attorney for the petitioner in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information, and belief. This petition is not filed for the purpose of delay, and I believe the petitioner is justly entitled to the relief sought.

A. F. SCHAETZLE.

Subscribed and sworn to before me this 20th day of May, 1938.

RUTH LITTELL,
Notary Public.

(Seal)

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25 (Notice of filing of Petition for Review.)

Filed May 24, 1938, U. S. Board of Tax Appeals.

To:

Commissioner of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

Herman Oliphant, Attorney for Respondent,

Chief Counsel,
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

You Are Hereby Notified that on the 24th day of May, 1938, a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above-entitled cause, was filed with the Clerk of the Board. A copy of the petition as filed is attached hereto and served upon you.

Dated 5/24/, 1938.

A. F. SCHAETZLE,
Attorney for Petitioner,
402 Hubbell Bldg.,
Des Moines, Iowa.

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 24th day of May, 1938.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

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26 (Stipulation of Facts.)

Filed at Hearing May 5, 1937, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between the petitioner and respondent in the above entitled case and by and between their respective counsel, that the following constitute the facts necessary for a determination of said case and same may be regarded as the facts in said case:

1. F. W. Fitch, petitioner, is a resident of Des Moines, Polk County, Iowa and duly filed a Federal Income Tax Return for the calendar year 1933.

2. Petitioner is president and principal stockholder of The F. W. Fitch Company, an Iowa corporation, engaged in the manufacture and sale of Fitch Hair Tonic and Shampoo and a general line of cosmetics. The manufacturing plant and principal place of business of the corporation is located in Des Moines.

3. Petitioner married Lettie S. Fitch on November 9, 1892 and they lived together as husband and wife until about 1917. There was born to said petitioner and his said wife as
27 the issue of their marriage, a son named Gail W. Fitch, born July 2, 1898; a daughter Mildred Fitch, born March 29, 1901; a daughter Lois Fitch, born September 1, 1902; and a son, Lucius W. Fitch, born March 27, 1906. Commencing about 1917 the petitioner and his said wife separated and ceased living together as husband and wife, setting up separate living establishments. In 1919 petitioner purchased a home for his said wife at a cost of about $5,000.00, furnished said home for her and gave her an automobile.

4. On December 27, 1922 Lettie S. Fitch filed a suit for separate maintenance against the petitioner in the District Court

of the State of Iowa in and for Polk County. A copy of the Petition in the said suit for separate maintenance including motion for temporary alimony, etc. is hereto attached, marked Exhibit "A" and by this reference is made part hereof. Fred W. Fitch, the defendant in the said suit, filed no pleading whatsoever in the said suit.

5. After the filing of said suit for separate maintenance, the petitioner and his wife, through their counsel, entered into negotiations which resulted in the following transactions:

(a) April 1, 1923 petitioner (and his wife, for the purpose of releasing dower rights) entered into a lease agreement with The F. W. Fitch Company, under the terms of which the premises owned by the Petitioner were leased to The F. W. Fitch Company for a term of Ninety-nine years at an
28 annual rental of $12,000.00.

(b) April 7, 1923, the said suit for separate maintenance was dismissed without prejudice and the costs paid by Lettie S. Fitch, the plaintiff therein.

(c) On April 23, 1923 the trust agreement, a copy of which together with lease is marked Exhibit "B" and hereto incorporated by this reference, was executed. The terms of the said trust agreement have been and are now being substantially complied with by all parties concerned.

6. On April 14, 1925 Lettie S. Fitch filed suit for divorce in the District Court of Iowa, in and for Polk County. The pleadings of both parties in the said suit for divorce are hereto attached, marked Exhibit "C", and are by this reference made part hereof.

7. A copy of the final decree of the Court in the said suit for divorce, marked Exhibit "D" is attached hereto and by this reference made part hereof, and pursuant thereto petitioner transferred to Lettie S. Fitch 600 shares of the common stock of The F. W. Fitch Company which stock on December 31, 1925 had a book value of $77,959.80, and paid to her attorney the sum of $23,500.00 out of which she received the sum of $8,500.00, the balance representing her counsel fees and expenses.

8. The F. W. Fitch Company was incorporated under the laws of Iowa in June of 1919. The Articles of Incorporation provided for an authorized capital stock of $500,000.00 divided into 5,000 shares of the par value of $100.00 each. On July 25, 1929 capital stock was issued for the assets of the
29 predecessor partnership as follows:

Name	No. Shs.	Par Value
F. W. Fitch (Petitioner)	1,860	$186,000.00
Lettie S. Fitch (Wife)	10	1,000.00
B. F. Kaufman	10	1,000.00
Gail W. Fitch (Son)	10	1,000.00
Frank Emmke	10	1,000.00
Geo. E. Davis	60	6,000.00
J. J. Kirby	20	2,000.00
J. A. Williams	20	2,000.00
	2,000	$200,000.00

Lettie S. Fitch became Vice-President and a member of the Board of Directors of said corporation, though she had no regular hours of employment and did not devote much time to its affairs. Following incorporation in 1919, without regard to the value of her services, The F. W. Fitch Company by reason of petitioner's control thereof, paid her $300.00 per month. After creation of the aforementioned trust on April 23, 1923 Lettie S. Fitch ceased being an officer and director of the company and received no further payments.

9. During the year under review the trustee of the trust mentioned in paragraph marked 5(c) above distributed under the terms of the said trust agreement $4,752.00 to the petitioner and $7,128.00 to Lettie S. Fitch. The petitioner included as taxable income in his income tax return for the year under review the said $4,752.00 which he received from the said trustee. Respondent has added to the petitioner's income the sum of $7,128.00 which is the portion of the trust income paid to Lettie S. Fitch under the terms of the said trust agreement.

Executed this 4th day of May, 1937.

A. F. SCHAETZLE,
Counsel for Petitioner.

MORRISON SCHAFROTH.

31 Exhibit A.

Petition.

In the District Court of the State of Iowa in and for Polk County

Lettie S. Fitch, Plaintiff
No. 37321 vs. Equity
F. W. Fitch, Defendant

Plaintiff states:

Par. 1. That plaintiff and defendant are residents of the city of Des Moines, Polk County, Iowa.

Par. 2. That she was married to the defendant, F. W. Fitch, at Liscomb, Iowa, on the 9th day of November, 1892. That there was born to plaintiff and defendant as the issue of said marriage, five children, four of whom now survive.

Par. 3. That subsequent to the marriage of plaintiff and defendant, the defendant without fault on the part of this plaintiff, began and continued abusing and mistreating plaintiff in such a cruel and inhuman manner as to impair her health and endanger her life.

Par. 4. That said defendant does not live with his wife and family, that he does not associate with them in their home and that he fails, refuses and neglects to maintain this plaintiff and support her in a manner comparable with his ability and their standing in the community.

Par. 5. That the defendant is a wealthy man and has an income of from $50,000 to $60,000 per year. That this plaintiff is without means of support other than that to which she is entitled as the wife of the said defendant.

Par. 6. That the business of defendant is the result of the original joint efforts of this plaintiff and defendant. That he has assumed all control over said business to the ex-
32 clusion of this plaintiff and has failed to provide for her in a proper manner.

Wherefore plaintiff prays that she may have a decree of separate maintenance from the defendant awarding her a suitable sum under the circumstances for her support and maintenance during her lifetime, and impressing the property of the defendant with a lien guaranteeing the payment of such sum as the court shall find the plaintiff entitled to, and for attorneys fees, suit money and for such further, full and complete relief as may be equitable in the premises.

R. R. NESBITT
Attorney for Plaintiff.

State of Iowa,
County of Polk—ss.:

I, Lettie S. Fitch, first being duly sworn on oath depose and say that I am the plaintiff named in the foregoing petition. That I have read the same and know its contents and the statements and allegations therein contained are true and correct as I verily believe.

LETTIE S. FITCH

Subscribed and sworn to before me and in my presence by the said Lettie S. Fitch this 27th day of December A. D. 1922.

R. R. NESBITT
Notary Public in and for
Polk County.

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33 Motion for Temporary Alimony, Suit Money and Attorneys Fees

In and for Polk County

Lettie S. Fitch, Plaintiff
No. 37321 vs. Equity
F. W. Fitch, Defendant

Comes now the plaintiff in the above-entitled cause and moves the court to require the defendant to pay into court a suitable sum as alimony, suit money and attorneys' fees, for her maintenance and in order to permit her to properly prosecute the above entitled action, and in support of said motion refers the court to the pleadings in said cause which are by reference, made a part hereof, and to the affidavit hereto attached.

Respectfully submitted.

R. R. NESBITT
Attorney for Plaintiff

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34 State of Iowa,
County of Polk—ss.:

I, Lettie S. Fitch, first being duly sworn on oath depose and say that I am the plaintiff named in the above entitled cause. That I was married to the defendant as in said petition set out. That I have a cause of action against the de-defendant as in said petition set out. That I am informed by the defendant that he intends to make this an extended and expensive piece of litigation; that the trial of said cause will

require me to secure evidence from various points over the country, including Chicago, Kansas City and elsewhere out of the city, which will necessarily be expensive and such evidence will be necessary and proper in the prosecution of this case by the plaintiff.

That this plaintiff has no funds of her own with which to prosecute said cause of action, nor to pay her counsel for his services in said cause, nor to maintain herself and family during the pending litigation, other than the small salary of $300.00 per month which is paid her as Vice President of the F. W. Fitch Company. That said salary is inadequate for the expense of herself and family, especially is this true in view of the fact that she has recently undergone a serious operation at the Methodist Hospital, and for which services she is still indebted.

That the defendant is a man of some means, being the owner of the lot upon which the building of the F. W. Fitch Company is now located and the owner of the building of the F. W. Fitch Company valued at $150,000.00, subject to an encumbrance of some $50,000 or $60,000.

That he has an income therefrom of $750.00 per month.

That he is an official of the F. W. Fitch Company, and
35 draws a salary as president thereof in the sum of $500.00 per month. That he is the owner of approximately 1,880 shares of stock in the F. W. Fitch Company, having a par value of $100.00 each and that the said defendant received as a dividend on said stock for the year 1922, the sum of $37,200.00. That in addition to the above, the defendant is the owner of an undivided interest in the Drummond Apartments in the City of Des Moines, Polk County, Iowa and this affiant is informed and believes that the interest of the defendant therein is that of two-thirds owner. That the said Drummong Apartments is of the approximate value of $20,000.00. That he is the owner of a certain tract of land in Wisconsin of approximately 1000 acres of the approximate value of $47,000.00. That he is also the owner, as this affiant is informed and believes, of stock to the value of $1000.00 in the Bankers Trust Company of Des Moines, Iow.

That the said defendant has no one depending upon him for support other than this plaintiff and two minor children, and all of the support of said minor children and of this plaintiff, excepting the expense of college education for one of said minor children and the bills for medical services and

for fuel, have been met by this plaintiff out of the small salary paid her as Vice President of the F. W. Fitch Company.

(Signed) LETTIE S. FITCH

Subscribed and sworn to before me and in my presence by the said Lettie S. Fitch this 10th day of January A. D. 1923.

R. R. NESBETT
Notary Public in and for Polk County, Iowa.

(Seal)

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36 Exhibit B

Lease.

This indenture made and entered into this 1st day of April, A. D. 1923, by and between Fred W. Fitch of Des Moines, Iowa, party of the first part and hereinafter called lessor, and the F. W. Fitch Company, a corporation of Des Moines, Iowa, party of the second part and hereinafter called lessee, Witnesseth:

First. The party of the first part hereto, the said lessor, in consideration of the rents herein reserved and of the covenants and agreements hereinafter expressed on the part of the party of the second part, the lessee, and to be by it kept, performed and fulfilled have demised and leased, and do by these presents demise and lease unto the party of the second part the following described premises in the City of Des Moines in the County of Polk and State of Iowa, to-wit:

The South Seventy One (71) and One Half (½) feet of Lot Eight (8) in Block No. Forty-three (43) in Lyons Addition to Fort Des Moines, now forming a part of the City of Des Moines, Polk County, Iowa.

together with the four story factory building and basement situated thereon.

To Have and to Hold the above described premises with the rights, priviledges, easements and appurtenances thereto belonging unto the said lessee for and during the term of ninety-nine (99) years from and after the first day of April, 1923, that is to say, until the 31st day of March, A. D. 2022 including both of said dates, paying rent therefor, performing various duties and obligations, and yielding possession thereof as hereinafter provided.

Second. The lessee, parties of the second part, covenant and agree to pay to the lessor, his assigns, legal representatives or trustee as rent for the demised premises a monthly rental of $1000.00 payable in advance commencing on the first day of April, 1923 and payable on the first day of each month thereafter until the expiration of said 99 year period.

All rents are to be paid by the lessee to the lessor, his assigns, legal representatives or trustee at the Bankers Trust Company in the City of Des Moines, Iowa, or at such other place or places in the City of Des Moines, Iowa as the lessor, his assigns, legal representatives or trustee may from
37 time to time in writing designate, all in gold coin of the United States of America of or equal to the present standard of weight, fineness and value. All rent provided for in this lease shall bear interest at the rate of eight per cent per annum payable semi-annually after the same becomes due until paid.

Third. As a further consideration for the demising and leasing of the aforesaid premises, the said lessee further covenants and agrees to pay in addition to such rent reserved all taxes, special assessments, rates, charges and levies general and special of every name, nature and kind whatsoever including the light, heat and water, rates and other rates which may be charged, taxed, assessed, levied or imposed upon or against the property leased hereby whether the same be upon or against the leasehold estate hereby created, or upon or against the reversionary estate in said premises during the full term hereby granted and all such taxes, rates, charges, assessments and levies are to be paid as they become due and before they become delinquent, and lessee further agrees to obtain and deliver to the lessor duplicate receipts for all taxes, rates, charges, assessments and levies paid on any and all of said property, and such duplicate tax receipts shall be delivered to the lessor before said taxes or assessments would become delinquent if unpaid.

The said lessee is hereby authorized and empowered to sign any statutory waiver necessary to procure the right to pay any special rates and assessments in installments, but it is expressly understood and agreed, however, that the taxes, special assessments and rates to be paid hereunder by the lessees are all of the taxes, special assessments and rates now or that may hereafter become a lien upon said premises prior to the expiration of this lease whether the installments of the same are due before the expiration of this lease or not.

It is further agreed that in case of the non-payment of, or the failure of the lessee to pay and discharge any taxes, as-

sessments, rates, charges or levies as herein provided, or in case of the failure of the lessee to insure or to maintain insurance as provided in this lease, or to pay the premiums
38 thereon, or to make the loss under said policies payable to or to deliver the same to the lessor, his assigns, legal representatives or trustee as provided in this lease, or in case of waste, or in the event of any other breach of or default by the lessees in any of the provisions, covenants or conditions of this lease, then in any such event the said lessor, his assigns, legal representatives or trustee may, at their option and without prejudice to any other right hereunder arising in consequence of such breach or default, procure or effect such insurance or pay such premiums, taxes, assessments, rates, charges or levies, or redeem from any sale or forfeiture made because of the non-payment thereof, or buy in said premises at any tax sale or expend whatever moneys may be necessary to repair, protect or preserve said premises, or to restore the same as herein agreed, and the amount of any and all payments so made in this behalf as well as all other moneys or sums advanced by the lessors, his assigns, legal representatives or trustee under the authority of or pursuant to any of the terms or provisions of this lease shall be forthwith repaid by the lessee to the lessor, his assigns, legal representatives or trustee with interest thereon at the rate of eight per cent per annum payable semi-annually from the date such moneys are paid by the lessor, his assigns, legal representatives or trustee until repaid, and such amounts and interest shall be admitted and taken and are hereby declared to be so much additional and further rent for the above demised premises, which shall be due and payable from the lessee to the lessor, his assigns, legal representatives or trustee at the next rent day after such amount shall have been paid by the lessor, his assigns, legal representatives or trustee, and the said lessor, his assigns, legal representatives or trustee shall have a lien for the repayment of the same and of every part thereof, to the same extent as for other rent herein reserved. In making such payments, it shall not be obligatory upon the lessor, his assigns, legal representatives or trustee to inquire into the validity of any such tax, assessment rate, charge or levy or into the validity of any such tax sale.

39 Fourth. The lessee further covenants and agrees that it will insure against fire during the full term of this lease any and all buildings or improvements that are now or may be placed or built upon said premises including insurance on buildings in course of construction in good, solvent and responsible company or companies to the amount of 80%

of the appraised value of said buildings now or hereafter thereon, said appraisement to be made every ten years from the date of this lease, and said insurance to cover the appraisement as made. It is further agreed that in the event of total destruction of the building or buildings that are now or may be placed upon said premises, the proceeds of said insurance shall go into a new building of equal or greater value than the one destroyed. All policies issued and renewals thereof of all such insurance upon said buildings and improvements, shall be issued in the name of the lessor, his assigns, legal representatives or trustee, with loss, if any, payable, first, to the lessor, his assigns, legal representatives or trustee, and, second, to the lessee or other parties as their interest may appear. All policies shall by the lessee be promptly delivered to the lessor, his assigns, legal representatives or trustee to be held by either of them as the case may be, as additional security for the rent and for the performance of other conditions hereof, including the re-building as herein provided.

It is further agreed that all insurance policies shall be so written that in the event of loss no insurance company shall have recourse upon the lessor, his assigns, legal representatives or trustee.

It is further agreed and covenanted that if at any time or times during the continuance of this lease or as often as any building or improvement on said premises, or any part thereof, shall be damaged, injured or destroyed, the lessee will at its own cost and expense, repair, restore and re-build the same upon the same general plan and dimensions and of equal or greater value as before said damage, injury or destruction, and the lessee will complete said repairs, or reconstruction with all reasonable diligence and will have said building or buildings repaired, restored and re-built ready for occupancy within 12 months from the time of such loss, damage, injury or destruction making allowances for all delays/occasioned or caused beyond the control of the lessee.

In case of any loss under any policy of insurance on any building or improvement on said premises the entire amount thereof shall be paid to and collected by the lessor, his assigns, legal representatives or trustee and after the payment of the costs of collection the balance shall upon notice from the lessee that they are ready to repair, restore or rebuild said buildings, be paid to a responsible bank or trust company, as trustee, to be expended as hereinafter provided

for the repair, re-building and restoration or addition to said buildings or improvements and as additional security for the performance and observance by the lessee of the covenants of this lease.

The said insurance money so collected shall be paid out in reasonable installments from time to time upon certificates of competent, reputable local architect or architects employed by the lessee or upon such other evidence as may be satisfactory to the trustee and those doing work and furnishing material for said work, provided, however, that there shall be no payments made out of said funds until it shall appear that the lessee has made sufficient expenditures either in cash or material or both as together with the funds so held by the lessor, his assigns, legal representatives or trustee will be sufficient to fully complete free from any and all claims or liens arising on account of labor or material furnished for the repairs, restoration or re-building necessary to place upon said premises improvements equal to those injured, damaged or destroyed as heretofore provided, and it is further agreed and covenanted that such funds so held by the trustee shall not be used for the repair, re-building or restoration of buildings unless the lessee is not in default in the performance of any of the covenants or conditions of the lease. Any funds remaining in the hands of the lessor, his assigns, legal representatives or trustee, after repair, re-building or restoration of the building or buildings, shall be paid to the lessee.

41 In event, however, that the lessee shall fail to repair, restore or re-build any building or improvement on said premises or any part thereof damaged, injured or destroyed by fire, as herein provided or shall be in default in the performance of any of the covenants or conditions of this lease either before or at the time or before completion of said repairs, re-building or restoration of said buildings then and in such cases or either of them any insurance money in the possession of such lessor, his assigns, legal representatives or trustees shall be forfeited and paid to the lessor, his assigns, legal representatives or trustee herein to be retained and held by them as their property without prejudice, however, to any other rights or [remidies] of the lessor, his assigns, legal representatives or trustee under the lease or otherwise arising in consequence of any such default on the part of the lessee.

Fifth: If the lessee shall desire, it may at any time during the term of this lease erect a new building upon said

premises or make any alterations in or additions to the buildings now or then upon the leased premises, and in that event the lessee will complete and pay for all of the said work and improvements and will make good any impairment of the stability, carrying power or durability of any building altered or added to and will hold and save the lessor, his assigns, legal representatives or trustee and their property harmless from any loss, expense or liability whatsoever arising on account of the said work and from any loss, expense or liability for injuries to persons or property in any manner growing out of the same and that said improvement, alteration or repairs will be made in strict compliance with all national and state laws and all city ordinances, rules and regulations.

Sixth: Nothing in this lease contained shall be construed to authorize the lessee to do any act or make any contract so as to encumber in any manner the title of the lessor, his assigns, legal representatives or trustee in said land or buildings or any part thereof.

The lessee further covenants and agrees that the
42 leased premises and any building or buildings which may at any time be thereon shall not be used for any improper or unlawful purposes and the said lessee will keep and maintain the same with all improvements and the sidewalks, steps and areas adjacent thereto in good, safe and sanitary condition at all times, and so as to conform to and be in compliance with all ordinances, statutes and laws applicable to the same, and the said lessee will protect and indemnify and forever save and keep harmless the lessor, his assigns, legal representatives or trustee, from and against any penalty, fine, damage, expense or charge imposed or assessed or incurred for any violation or breach of any of said ordinances, statutes or laws.

Seventh: The lessee further covenants and agrees that it will forever protect, indemnify and save harmless, the lessor, his assigns, legal representatives or trustee and their title and estate in said premises, including the land, buildings, improvements and leasehold interest created hereby, from and against any prescriptive or other right or easement whatsoever that might be acquired or established thereto or thereon, or to any part thereof, adverse to the title or estate now possessed by the lessor, his assigns, legal representatives or trustee and also from and against any and all penalties, fines, charges, liens, damages, costs, expense, demands and attorneys' fees and from and against any and all li-

ability or loss of any kind or character whatsoever arising or resulting during the continuance of this lease, from or on account of any acts or omissions of the lessee or either of them, their servants, agents and employees and from or on account of any acts or omissions of persons claiming by, through or under lessee or either of them, and from and against any and all other liabilities or loss whatsoever that said lessor, his assigns, legal representatives or trustee and said premises, may sustain including the building and improvements thereon, the intention and spirit of this lease being to obligate the said lessee in consideration of the rental as fixed to assume all liability and losses of every kind and character whatsoever, in addition to the rent provided for herein, so that the lessor, his assigns, legal representatives or trustee
43 shall be paid and shall receive said fixed net rent provided for herein, without any diminution or abatement whatsoever, and this lease shall at all times be so interpreted and construed that the rent reserved hereunder shall be and constitute a net remuneration to the lessor, his assigns, legal representatives or trustee from the lessee for the use of the ground and premises covered by this lease, during the full term of this lease and that the lessor, his assigns, legal representatives or trustee shall be to no further expense on account thereof or in connection therewith during the term of this lease, provided, however, that nothing herein contained shall require the lessee to pay any income or inheritance tax due from the lessor, his assigns, legal representatives or trustee.

Eighth: It is further understood and agreed that upon any failure of the lessee to perform or comply with the terms, provisions or covenants of this lease, to be by the said lessee kept and performed, or any one of them, if such failure shall continue for 90 days after written notice of such failure given by the lessor, his assigns, legal representatives or trustee to the lessee, then at the election of the said lessor, his assigns, legal representatives or trustee, such failure to perform the conditions or provisions of this lease or any of them, and continuation of failure after notice as above set forth, shall make the whole amount of rent for said term due and payable, and lessor, his assigns, legal representatives or trustee may proceed at law to collect the rent and apply the same less expenses on the indebtedness and hold lessee for the balance, or to declare a forfeiture of this lease and of all the rights of the lessee thereunder, and the lessee upon notice to them of such election by the lessor, his assigns, legal representatives or trustee, shall, within 90 days thereafter, quit and surrender said premises without

further notice to quit, and the lessor, his assigns, legal representatives or trustee may recover possession thereof by action of forcible entry and detainer, or in any other legal manner and upon such forfeiture of this lease, or upon its termination in any other manner, all of the rights and leases of any sub-tenants, holding under such lessee in and
44 to any part of said premises, shall immediately cease and terminate without any notice whatsoever to them.

It is further agreed, that in the event the lessor, his assigns, legal representatives or trustee shall, without any fault on their part, be made party to any litigation commenced by or against the lessee, then the lessee shall pay all costs and attorneys' fees incurred by or against the lessors in connection with said litigation. The lessee shall and will also pay all costs and attorneys' fees incurred by or against the said lessor, his assigns, legal representatives or trustee in enforcing the covenants, agreements, terms and provisions of this lease.

It is further covenanted and agreed that the lessor, his assigns, legal representatives or trustee in addition to the lien given them by law, shall have a lien for all costs and attorneys' fees and for the rent reserved in this lease and for all taxes and assessments paid by the lessor, his assigns, legal representatives or trustee upon the land leased hereby and for the re-payment of all moneys advanced or paid by them if any, under this lease upon all buildings and improvements placed upon said premises and upon the leasehold estate hereby created, and such lien shall continue until the amounts due lessor, his assigns, legal representatives or trustee with interest are paid, and said lien may be enforced by the procedure for the enforcement of landlords liens or in any other lawful manner.

Ninth: All notices or demands provided for herein to be given or made by the lessor, his assigns, legal representatives or trustee may be made by personally delivering a copy of such notice or demand to the lessee or by mailing a copy of such notice or demand to the lessee at its last address known to the lessor, his assigns, legal representatives or trustee and by posting a copy of said notice upon said premises or by serving such notice or demand upon said lessee in any manner then provided by law for the serving of original notices in a suit at law.

Tenth: No waiver of any breach of any covenant, agreement or condition of this lease, shall be construed to
45 be a waiver of any other such breach subsequently occurring, no matter when or how such waiver may be made.

Eleventh: Upon the expiration of this lease, either by lapse of time or otherwise, the lessee will surrender said premises with all improvements then thereon to the lessor, his assigns, legal representatives or trustee in good order, condition and repair, the usual wear occasioned by lapse of time alone excepted.

Twelfth: The said lessee further covenants and agrees that it will not assign this lease without first notifying the lessor, his assigns, legal representatives or trustee in writing of the name of such assignee, and such assignment shall not be valid until such assignee shall fully assume in writing all of the duties and obligations of the lessee, such assumption to be duly acknowledged by the assignee and duly recorded in the office of the Recorder of Polk County, Iowa, and a duplicate original of said assumption duly executed and acknowledged by the assignee and delivered to the lessor, his assigns, legal representatives or trustee, and all other and later assignments made by any assignee shall be subject to like requirements, duties and obligations in every respect.

The lessee shall cause this lease to be filed and recorded in the office of the Recorder of Polk County, Iowa.

The lessor, his assigns, legal representatives or trustee covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever claiming by, through, or under them.

Thirteenth: This indenture is intended to and does cover all of the agreements and representations between the parties hereto in relation to the above described premises, and the leasing thereof, and it is expressly agreed, in view of the length of the term of this lease, that no change or alteration thereof shall be made, nor shall any change or alteration thereof be held binding upon any of the parties hereto, nor shall any evidence be given or received thereof unless the same is reduced in writing and signed by each of the parties hereto, their legal representatives, successors or assigns.

46 Fourteenth: All the provisions, conditions and covenants of this lease, whether it be so expressed or not, shall bind and inure to the benefit of (as the case may be) the heirs, successors, executors, administrators, trustees and assigns of the respective parties hereto.

In Witness Whereof the parties hereto have executed this instrument in duplicate on the day and year first above written.

FRED W. FITCH,
Lessor.

LETTIE S. FITCH,
Wife of Lessor.

F. W. FITCH COMPANY,
By Fred W. Fitch, Pres.
By J. J. Kirby, Secy.

State of Iowa,
Polk County—ss.:

Be it remembered that on the 7th day of April, A. D. 1923, before me the undersigned notary public in and for said county, personally came Fred W. Fitch and Lettie S. Fitch, husband and wife, to me personally known to be the identical persons whose names are affixed to the within lease and acknowledge the execution of the same to be their voluntary act for the purposes herein expressed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal on the date last above written.

EDITH WILLIAMS,
Notary Public, in and for
Polk County.

State of Iowa,
Polk County—ss.:

I, J. J. Kirby, on oath state that I am the Secretary and a director of the F. W. Fitch Company. That on the 7th day of April, A. D. 1923, the directors held a meeting at the office of the company at 11:00 o'clock a.m., majority of all of said directors being present in person; that the directors by unanimous vote adopted the following resolution:

That the President and Secretary be authorized to execute a lease with Fred W. Fitch as lessor for the following described premises;

The South 71½ ft. of Lot 8 in Block #43 in Lyons Addition to Fort Des Moines, now forming a part of the City of Des Moines, Polk County, Iowa,

together with the four story factory building and basement situated thereon, and to pay therefor for a term of ninety-

nine years from and after the 1st day of April, A. D.
47 1923, the net monthly rental of $1000.00 per month, and were fully authorized to sign and execute for the said company the within lease.

Signed this 7th day of April, A. D. 1923.

J. J. KIRBY.

Subscribed in my presence and sworn to before me, a Notary Public in and for Polk County, Iowa, by the above mentioned J. J. Kirby, to me known to be the identical person named in and who executed the foregoing instrument, acknowledging that he executed the same as his voluntary act and deed and the voluntary act and deed of the Board of Directors of the F. W. Fitch Company.

EDITH WILLIAMS,
Notary Public, in and for
Polk County.

48 (Endorsed): #12976. Fred W. Fitch to F. W. Fitch Co. Filed for Record in Polk County, Iowa, on April 12, 1923.—893 page 100, Mrs. E. O. Fleur, Recorder. Pd. $4.90.

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49 Part of Exhibit B.

Agreement.

This Agreement made and entered into this 23rd day of April, A. D. 1923, by and between Fred W. Fitch and Lettie S. Fitch, husband and wife, both of Des Moines, Iowa, hereinafter referred to as Grantors, and the Bankers Trust Company, a corporation duly and legally organized under the laws of the State of Iowa, with its principal place of business at Des Moines, Polk County, Iowa, named as Trustee, and hereinafter referred to as Trustee,

Witnesseth, that

Whereas the Grantors desire to transfer and convey certain real estate located in Des Moines, Polk County, Iowa, and assign and transfer the lease thereon, with all the profits therefrom unto the said Trustee to be taken, received and thereafter held by the Trustee under the terms and conditions of this agreement and administered by it as hereinafter provided,

Now, Therefore, in consideration of the premises, the said Fred W. Fitch and Lettie S. Fitch, Grantors, do hereby sell and convey unto the Bankers Trust Company, as Trustee,

the following described real estate situated in the County of Polk and State of Iowa, to-wit:

The South Seventy-one and one-half (S71½) Feet of Lot Eight, (8), Block Forty-three (43), Lyons Addition to Fort Des Moines, now included in and forming a part of the City of Des Moines,

with all buildings and improvements thereon, or such as shall hereafter be constructed.

And the said Grantors do hereby assign, set over and transfer unto the Bankers Trust Company, as Trustee, the lease upon the real estate above described, more particularly described as follows: a lease dated 1st day of April, A. D. 1923, by and between Fred W. Fitch of Des Moines, Iowa, party of the first part, lessor and F. W. Fitch Company, a corporation of Des Moines, Iowa, party of the second part, lessee, by the terms of which agreement said property is leased for a term of 99 years from and after the 1st day of April, 1923.

50 Said conveyance and said lease and the income from the property and the rental thereof, however, are to be held in trust for the purposes and for the benefit of the persons hereinafter named and designated under and subject to the provisions and conditions, and with the powers and duties hereinafter set forth, and none other, excepting such as are incidental to the carrying out of the purposes of this agreement. To have and to hold the same unto the said Bankers Trust Company, as Trustee, and its successors in trust for and during the whole of the period described and designated as the trust period.

Article 1. The Trust period shall commence upon the execution of this instrument and shall exist during the lives of the following named persons, who are now living, namely, Fred W. Fitch and Lettie S. Fitch, and said trusteeship shall continue in any event for a period of fifteen years.

Article 2. During the whole of the trust period aforesaid, the trustee shall have full power and authority in the premises, subject to such limitations as are hereinafter set out as follows:

(1) To hold the title to said real estate and said lease, and the assignment thereof, and to do all things necessary and all things which are reasonable and proper for the best interest of said trust estate and the beneficiaries of this trust in caring for said real estate and carrying out the terms and conditions of said trusteeship, including the execution of

mortgages or extension thereof, for the purpose of refinancing any loans which may be secured by mortgage or mortgages on said property.

(2) It is expressly agreed that the said Fred W. Fitch shall pay off all encumbrances upon the property described and known as the South 71½ feet of Lot 8, Block 43, Lyons Addition to Fort Des Moines, now included in and forming a part of the City of Des Moines, with the buildings and all improvements thereon, within ten years from the date hereof, and he shall pay all interest on said mortgages as the same become due. And in the event the said Fred W.
51 Fitch shall decease prior to having cleared the property of the encumbrances as above described, then said encumbrances shall be cleared from the proceeds of the estate of the said Fred W. Fitch, and shall be a prior lien and claim against the property of the estate of the said Fred W. Fitch. In case any mortgage on said property shall mature during the lifetime of the said Fred W. Fitch and the same is not paid by him, the said trustee is hereby given full and specific authority to enter into an agreement to extend the time of payment thereof or to refinance the same by the execution of a new note and mortgage for a like amount upon said property.

(3) In the event that the encumbrance has been paid as above provided during the lifetime of the said Fred W. Fitch, the above property shall not again be encumbered without the consent of the said Lettie S. Fitch, if living, or if deceased then of the beneficiaries named in this trust.

(4) In the event the lease now upon the premises is not carried out and if shall become cancelled or forfeited either for failure to comply with its terms or for any other reason, then the said trustee may lease said property with the consent of the said Lettie S. Fitch and Fred W. Fitch, or the survivor, upon the best terms and for such term as to the said trustee and the said Lettie S. Fitch and Fred W. Fitch or the survivor may deem proper, but it is understood and agreed that if the said trustee and the said Lettie S. Fitch and Fred W. Fitch or the survivor cannot agree as to the terms of such lease then the decision of the trustee shall be final. But in the event it becomes necessary to again lease the above described property, as in this section provided, the term of said lease shall not extend for more than five years beyond the termination of this trust.

(a) The said Trustee shall have power and authority to demand, collect, due and receipt for the rents, issues and

profits arising therefrom which may be had for the use of the property hereinbefore described.

52 (b) To bring, maintain and defend actions, both at law and equity involving, growing out of or in any wise affecting the property of this trust estate or the title thereto.

(c) To settle, and compromise, either before or after suit has been brought thereon, any claim asserted by or against such Trustee, or any property of this trust estate.

Article 3. The net income of the trust property, after deduction of all necessary, proper and reasonable expense of the trust estate and the compensation of the Trustee as hereinafter specified, shall be paid as follows:

(1) Six Hundred Dollars to Lettie S. Fitch, one of the Grantors named herein, on the first day of April A. D. 1923, and Six Hundred Dollars on the first day of each month thereafter during the life time of the said Lettie S. Fitch, and thereafter to her children hereinafter named, and their heirs as hereinafter provided, except that the fees of the trustee and expenses as hereinafter provided shall be deducted once each year.

(2) The balance of the net income shall be paid to Fred W. Fitch, one of the Grantors herein, during his lifetime, and thereafter to his children hereinafter named, and their heirs as hereinafter provided, except that the fees of the trustee and expenses as hereinafter provided shall be deducted once each year.

(3) In the event of the death of the said Lettie S. Fitch, grantor herein, prior to the expiration of the trust period as herein provided, the Six Hundred Dollars per month, after the deduction of all necessary, proper and reasonable expenses of the trust, including the compensation of trustee hereinafter specified, shall be paid monthly as follows:

(a) One fourth to Gail W. Fitch, son of grantor, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

(b) One fourth to Mildred Fitch Young, daughter
53 of grantor, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

(c) One fourth to Lois Fitch Sandahl, daughter of grantor, and to the lawful heirs of her body; by lawful marriage, subject to limitations hereinafter provided.

(d) One fourth to Lucius W. Fitch, son of grantor, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

(4) In the event of the death of said Fred W. Fitch, grantor herein, prior to the expiration of the trust period as herein provided, then the amount provided for and payable to said Fred W. Fitch as hereinbefore provided, after the deduction of all necessary, proper and reasonable expenses of the trust, including the compensation of the trustee hereinafter specified shall be paid monthly as follows:

a. One-fourth to Gail W. Fitch, son of grantor, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

b. One fourth to Mildred Fitch Young, daughter of grantor, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

c. One fourth to Lois Fitch Sandahl, daughter of grantor, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

d. One fourth to Lucius W. Fitch, son of grantor, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

(5) In the event of the death of both the said Fred W. Fitch and Lettie S. Fitch, piror to the expiration of the fifteen year period herein provided, then the amount
54 designated herein as payable to the said Fred W. Fitch and Lettie S. Fitch, after the deduction of all necessary proper and reasonable expenses of the trust, including the compensation of the trustee hereinafter specified, shall be paid monthly as follows:

a. One fourth to Gail W. Fitch, son of grantors, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

b. One fourth to Mildred Fitch Young, daughter of grantors, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

c. One fourth to Lois Fitch Sandahl, daughter of grantors, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

d. One fourth to Lucius W. Fitch, son of grantors, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

Article 4. If at any time during the whole trust period herein provided any cestui que trust shall die without lawful heirs of his or her body surviving, said decedent's share of the net income of the trust estate shall be equally divided among the other cestuis que trustent per stirpes and not per capita, the intention of this article being that the said children of the grantors and their lineal descendants and no one else shall take, have and enjoy the net income of and from the trust property and estate aforesaid, and that such lineal descendants shall take per stirpes and not per capita.

Article 5. The payments of the net income to the cestuis que trustent as provided herein shall be made only upon the following express conditions, after the death of either or both grantors, according to the provisions of this trust as herein provided. Each installment shall be payable and shall be paid only to each cestui que trust personally and shall not be paid to any other person or persons, corporation or other organization, by reason of any assignment or transfer
55 by operation of law or otherwise of any supposed or possible right of anyone of said cestuis que trustent to receive the same. And in the event that any one of the said cestuis que trustent shall by operation of law, or by reason of any act of his or hers be barred or prohibited from receiving the payment of any installment and applying the same to his or her own use, such installment shall not be payable to him or her, but shall be payable by said trustee to the husband or wife of such cestui que trust, and if such cestui que trust have no husband or wife living with him or her then to his or her eldest next of kin, which money so paid to said husband, wife or next of kin, as the case may be, shall be applied to the care, board and keep and clothing of said cestui que trust, as far as may be proper or necessary in the judgment of the trustee. In the event of the mental incapacity of any one of the said cestuis que trustent, the amount payable to him or her hereunder shall be payable to their legal representative.

Article 6. The fees of the Trustee shall be one per centum of the income of the said Trust Estate to be deducted once each year by the Trustee, proportionally, from the share of each beneficiary of this trusteeship.

All necessary expenses of the trustee in carrying out the trust and including attorney fees in case it shall become necessary to employ attorneys shall be paid from the income of the estate proportionally and in the same manner as the payment of fees of trustee.

Article 7. In the administration of the trust aforesaid and in the accounting for and distribution of it, the trustee shall be held only to ordinary care and faithfulness, and in no wise be held liable or accountable for errors in judgment.

Article 8. It is understood and agreed that this trust period shall continue during the life time of Fred W. Fitch and Lettie S. Fitch and in any event for a period of fifteen years, that is to say, in the event the said Fred W.
56 Fitch and Lettie S. Fitch shall die prior to fifteen
years from the date of this instrument, then the trust period shall continue until fifteen years from the date of this trust agreement and in the event the said Fred W. Fitch and Lettie S. Fitch or either of them be living fifteen years from the date of this trust agreement, then this trust period shall continue, in any event, until the death of the said Fred W. Fitch, and in any event, until the death of the said Lettie S. Fitch, if she survive the said Fred W. Fitch.

Article 9. At the expiration of the trust period hereby created, said trustee shall account for, pay over, distribute, assign and convey unto the children of the grantors heretofore named and to their lineal descendants the trust property and estate then remaining in the hands and under the control of said trustee, said lineal descendants to take per stirpes and not per capita.

Article 10. In the event that the Bankers Trust Company shall become unable or unwilling to further act as trustee, then any judge of the District Court of Polk County, Iowa, exercising the powers conferred upon him by the District Court of Iowa shall be authorized, upon the application of a beneficiary, or beneficiaries herein named, to appoint as trustee any one of the five banks or trust companies located in Des Moines, Polk County, Iowa, having the largest amount of capital, surplus and undivided earnings. And in case of such vacancy and appointment of a new trustee, the trust fund and the real estate herein conveyed shall immediately vest in such trustee who shall exercise all the powers and be under all of the obligations imposed under this instrument upon the Bankers Trust Company, Trustee.

In Witness Whereof, we have hereunto subscribed our names the day and year first above written.

FRED W. FITCH,
LETTIE S. FITCH.

57 State of Iowa,
Polk County—ss.

Be it remembered that on this 23rd day of April, A. D. 1923, before me, the undersigned, a Notary Public in and for Polk County, Iowa, personally appeared Fred W. Fitch and Lettis S. Fitch, husband and wife, to me personally known to be the identical persons named herein, and who signed and executed the foregoing instrument and acknowledged the execution of the same to be their voluntary act and deed, for the purposes herein set out.

In Witness Whereof, I have hereunto affixed my official seal this 23rd day of April, A. D. 1923.

C. C. STORM,
Notary Public in and for Polk County Iowa.

The Bankers Trust Company, a corporation organized and existing under the laws of the State of Iowa, does hereby accept the trust by the foregoing instrument created.

In Witness Whereof the Bankers Trust Company has caused its name to be signed by its Vice-President and Secretary this 24th day of April, A. D. 1923, with the seal of the company affixed.

BANKERS TRUST COMPANY,
By L. B. Bartholomew,
Vice-President.

By S. C. Pidgeon, Secretary.

State of Iowa:
ss.
Polk County :

On this 2[illegible] day of April, A. D. 1923, before me ____________ a Notary Public within and for said County, personally appeared L. B. Bartholomew and S. C. Pidgeon, both to me personally known, who, being by me duly sworn, did say that they are the Vice President and Secretary, respectively, of the Bankers Trust Company, a corporation and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said L. B. Bartholomew and S. C. Pidgeon acknowledged said instrument to be the voluntary act and deed of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal at Des Moines, Iowa, the day and date last above written.

____
Notary Public

[illegible] + misc

Trust Agreement

Fred W. Fitch and
Lettie J. Fitch
To
Bankers Trust Co.
as Trustee

60 Exhibit C.

Certificate.

State of Iowa,
Polk County—ss.

I, Neva B. Chrisman, a Notary Public in and for Polk County, Iowa, hereby certify that I have compared the attached copy of the petition, together with two amendments thereto, with the originals filed in the office of the Clerk of the District Court, Polk County, Iowa and said copies are true and exact copies of the originals.

Dated this 29th day of October 1936.

NEVA B. CHRISMAN,
Notary Public.

(Seal)

61 Petition in Equity For Divorce.

In the District Court of the State of Iowa in and For Polk County.

Lettie S. Fitch, Plaintiff,
Divorce No. 2550. vs.
Fred W. Fitch, Defendant.

Comes now the plaintiff, Lettie S. Fitch, and for cause of action against the defendant, Fred W. Fitch, states:

Paragraph 1. That she is now and has been for the last year and more a resident of the City of Des Moines, Des Moines Township, Polk County, State of Iowa.

Paragraph 2. That her residence as above stated has been in good faith and not for the purpose of obtaining a divorce only.

Paragraph 3. That this application is made in good faith and for the purposes set forth herein.

Paragraph 4. That the plaintiff and the defendant were married at Liscomb, Iowa, on the 9th day of November, 1892, and have lived together as husband and wife until about 1917.

Paragraph 5. That during all of the time the plaintiff and defendant so lived together as husband and wife, this plaintiff at all times conducted herself towards her said husband as a dutiful and loving wife.

Paragraph 6. That beginning a number of years ago and with continuing and increasing design and purpose,
62 the defendant has subjected this plaintiff to such cruel and inhuman treatment as to endanger her life and health. That he has subjected her to continuing and increasing humiliation in person and with others, and has continuously advised her to obtain a divorce from him, and that in the event of her failure so to do he would undertake to procure a divorce from the plaintiff.

Paragraph 7. That this plaintiff is informed and believes, and hence alleges the fact to be, that the defendant moved to Reno, Nevada, sometime during January, 1925, and has established a purported temporary residence there with the open and avowed fraudulent purpose of continuing there a sufficient time to obtain a divorce from this plaintiff and deprive her of her property rights.

Paragraph 8. That during the year 1917, the defendant in violation of his marriage vows and without any fault of plaintiff wilfully deserted this plaintiff and has ever since absented himself from her without any reasonable or just cause therefor.

Paragraph 9. That there was born to plaintiff and defendant as the issue of said marriage, a son named Gail W. Fitch, who is now an adult; a daughter, Mrs. Mildred Fitch Young, who is now an adult; a daughter, Mrs. Lois Fitch Sandahl, who is now an adult; and a son Lucius W. Fitch, who is now nineteen years of age who is now residing with plaintiff and has ever since his birth, and who is now in college and is supported by the plaintiff.

Paragraph 10. That the defendant is possessed of personal property consisting of 2182 shares of the capital stock of the F. W. Fitch Company of the par value of $218,200, and this plaintiff is informed and believes that the actual value of said stock is greatly in excess of $400,000.00, and is informed and believes that the earnings from said stock is in excess of $50,000 per annum.

63 Paragraph 11. That the defendant is possessed of other personal property of substantial value and real property situated in Des Moines, Polk County, Iowa, of substantial value, a more particular description of which this plaintiff is unable to give.

Paragraph 12. This plaintiff is informed and believes, and hence alleges the fact to be, that the defendant has made an alleged fraudulent transfer of a large portion of his stock

in the F. W. Fitch Company for the purpose of defeating this plaintiff's rights therein, and in aid of his avowed purpose of divorcing this plaintiff from him and of not contributing to her welfare or support, and of not making a fair and equitable distribution of the products of their joint endeavor, and of defeating the rights of their children to share in said property, but this plaintiff alleges that said transfer was without consideration and void.

Paragraph 13. That the defendant has excluded the plaintiff from all control over the business of the F. W. Fitch Company which was organized and developed by the continuous joint efforts of the plaintiff and the defendant, and has failed to provide for her and their minor child in a proper manner.

Paragraph 14. That the defendant claims to be a nonresident of the State of Iowa and has property within the State of Iowa as above mentioned, and that this plaintiff is entitled to an attachment against sufficient of said property to be held to satisfy the judgment or decree of the court herein.

Wherefore, this plaintiff, Lettie S. Fitch, prays that she be granted an absolute decree of divorce from the defendant, Fred W. Fitch: That she be restored to all of the rights, privileges and immunities of a single and unmarried person; that she be granted and given the custody and control
64 of their minor son, Lucius W. Fitch, and that she be given a judgment against the defendant for One Hundred Seventy-Five Thousand and no/100 ($175,000) Dollars, and for a reasonable attorney's fee, and for the costs of this action, and that said amount be decreed to be a lien upon the aforementioned property; and that an order issue for an attachment on the property of the defendant within the State of Iowa to make said amounts, and for such other and further relief as may be equitable in the premises.

CLARK & BYERS
Attorneys for Plaintiff.

State of Iowa
Polk County—ss.:

I, Lettie S. Fitch, being first duly sworn on oath depose and say that I am the person named as plaintiff in the above entitled cause; that I have read the above and foregoing petition and know the contents thereof, and that the statements therein contained are true as I verily believe.

LETTIE S. FITCH

Subscribed and sworn to before me by the said Lettie S. Fitch, this 14th day of April, 1925.

VIOLET TROE

(Seal) Notary Public in and for Polk County Iowa.

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65 Amendment to Petition.

In the District Court of the State of Iowa in and For Polk County.

Lettie S. Fitch, Plaintiff

Divorce No. 2550. vs.

Fred W. Fitch, and Gertrude Westberg, Defendants.

Comes now the plaintiff, and for amendment to her petition and for cause of action against the defendant Gertrude Westberg, states as follows:

Paragraph 1. That she reaffirms each and every allegation in paragraphs one (1) to fourteen (14), inclusive, in her original petition.

Paragraph 2. That the defendant Gertrude Westberg is a resident of the City of Des Moines, Des Moines Township, Polk County, State of Iowa.

Paragraph 3. That heretofore and prior to the 6th day of January 1925, the defendant Fred W. Fitch and the defendant Gertrude Westberg entered into a conspiracy against this plaintiff, whereby it was agreed that the defendant Fred W. Fitch should leave the State of Iowa, and should thereafter remain out of the State of Iowa and beyond the jurisdiction of this court, and that the defendant Fred W. Fitch should convey to the defendant Gertrude Westberg eighteen hundred ten (1810) shares of the stock in the F. W. Fitch Company, a corporation, to be held by the defendant Gertrude Westberg in secret trust for the use of the defendant Fred W. Fitch, with the intent on the part of the defendants, and each of them, to cheat and defraud this plaintiff, and to keep her from obtaining or receiving any part of the property of her said husband for her support, or for her
66 separate maintenance or alimony under order of this court, and with the intent of removing all of said property of the defendant Fred W. Fitch from the jurisdiction of this court, and to render it impossible for this plaintiff to obtain separate maintenance or [alimoney] out of said property or from the defendant Fred W. Fitch.

Par. 4. That in pursuance of said conspiracy, and with the intent on the part of both the defendant Fred W. Fitch and the defendant Gertrude Westberg to cheat and defraud this plaintiff, and without consideration and for the purpose of having the defendant Gertrude Westberg hold said property in secret trust for the defendant Fred W. Fitch, and for the purpose of removing the defendant Fred W. Fitch's property beyond the jurisdiction of this court, the defendant Fred W. Fitch, on or about the 6th day of January, 1925, secretly made a pretended transfer of the eighteen hundred ten (1810) shares of the capital stock of the F. W. Fitch Company to the defendant Gertrude Westberg, and caused the issuance of Certificate No. 15 of the F. W. Fitch Company to the defendant Gertrude Westberg for eighteen hundred ten (1810) shares of the capital stock of the F. W. Fitch Company.

Par. 5. That shortly thereafter, and some time during January, 1925, the defendant Fred W. Fitch absented himself from the State of Iowa and has established a purported temporary residence in Reno, Nevada, with the open and avowed fraudulent purpose of defeating this court of its jurisdiction and of obtaining a divorce from the plaintiff, and of depriving her of her property rights in said stock.

Par. 6. That thereafter, and some time during April 1925, the defendant Gertrude Westberg removed herself from the jurisdiction of this court, and this plaintiff
67 is informed and believes, hence alleges that fact to be,
that she is now outside of the State of Iowa, and this plaintiff alleges that said defendant Gertrude Westberg left the State of Iowa for the purpose of ousting this court of jurisdiction over the property above referred to, and of defeating this plaintiff's rights in said property.

Par. 7. That said eighteen hundred ten (1810) shares of stock is the property of the defendant Fred W. Fitch subject to the rights of the plaintiff therein, and that said alleged and purported transfer of said stock which was made heretofore and on or about the 6th day of January, 1925, to the defendant Gertrude Westberg was void and of no force and effect and a fraud upon this plaintiff and this court, and that this plaintiff is the absolute owner of an interest in said property, and that the defendant Gertrude Westberg's claim in said property is fraudulent and void, and that the plaintiff's right to and interest in said property, and her rights to a divorce and alimony and attorney's fees and costs had become fixed and absolute prior to that date as the defendants well knew.

Wherefore, plaintiff prays as in her original petition, and that the amounts claimed in said petition be decreed to be a lien upon the property of the defendant Fred W. Fitch, including the said eighteen hundred ten (1810) shares of stock in the F. W. Fitch Company; that any claim of the defendant Gertrude Westberg to said eighteen hundred ten (1810) shares of stock be adjudged to be fraudulent and void, and that the pretended transfer thereof to said Gertrude Westberg be set aside and held for naught; that the transfer thereof upon the books of said corporation issuing said stock be cancelled, set aside and held for naught; and that the attachment on said eighteen hundred ten
68 (1810) shares of stock heretofore made herein be decreed to be valid as against both of said defendants and that the defendant Fred W. Fitch be ordered to transfer said stock to this plaintiff and that in default thereof a commissioner be appointed to transfer said stock to this plaintiff, and for such other and further relief as may be equitable in the premises.

CLARK & BYERS,
Attorney for Plaintiff.

State of Iowa,
Polk County—ss.:

I, Lettie S. Fitch, being first duly sworn on oath depose and say that I am the person named as plaintiff in the above entitled cause; and that I have read the above and foregoing amendment to petition and know the contents thereof, and that the statements therein contained are true as I verily believe.

LETTIE S. FITCH.

Subscribed and sworn to before me by the said Lettie S. Fitch, this 4th day of May, 1925.

GREGORY BRUNK,
(Seal) Notary Public in and for
Polk County, Iowa.

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69 Second Amendment to Petition.

In the District Court of the State of Iowa, in and for Polk County.

Lettie S. Fitch, Plaintiff,
#2550. vs. Divorce.
Fred W. Fitch, and Gertrude Westberg, Defendants.

Comes now the plaintiff and for second amendment to her petition states as follows:

Paragraph 1. That the defendant, Gertrude Westberg, herein, was formerly a resident of the State of Iowa, and this

plaintiff is informed and believes, and hence alleges the fact to be, that the defendant, Gertrude Westberg, has departed therefrom with intent to avoid the service of an original notice and keeps herself concealed for said purpose.

Wherefore, plaintiff prays as in her original petition as amended.

CLARK & BYERS,
Attorneys for Plaintiff.

State of Iowa,
Polk County—ss.:

I, Lettie S. Fitch, being first duly sworn on oath depose and say that I am the person named as plaintiff in the above entitled cause; that I have read the above and foregoing second amendment to petition and know the contents thereof, and that the statements therein contained are true as I verily believe.

LETTIE S. FITCH.

Subscribed and sworn to before me this 3rd day of June, 1925.

GREGORY BRUNK,
(Seal) Notary Public in and for
Polk County, Iowa.

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70 Certificate.

State of Iowa,
Polk County—ss.:

I, Neva B. Chrisman, a Notary Public in and for Polk County, Iowa, hereby certify that I have compared the attached copies of answer of Fred W. Fitch and Gertrude Westburg, together with an amendment thereto, with the originals filed in the office of the Clerk of the District Court, Polk County, Iowa, and said copies are true and exact copies of the originals.

Dated this 29th day of October 1936.

NEVA B. CHRISMAN,
(Seal) Notary Public.

71 Answer of Fred W. Fitch.

In the District Court of Iowa, in and for Polk County.

Lettie S. Fitch, Plaintiff,
No. 2550 vs. Divorce
Fred W. Fitch, Defendant.

For answer to the plaintiff's petition, the defendant states:

Par. 1. The defendant admits paragraph 1 of plaintiff's petition.

Par. 2. The defendant admits paragraph 2 of plaintiff's petition.

Par. 3. The defendant admits paragraph 9 of plaintiff's petition.

Par. 4. The defendant admits paragraph 2 of plaintiff's first amendment to petition.

Par. 5. The defendant denies paragraph 3 of plaintiff's amendment to petition.

Par. 6. The defendant denies paragraph 4 of plaintiff's amendment to petition.

Par. 7. As to paragraph 5 of plaintiff's amendment to petition, the defendant denies that he has any fraudulent purpose of defeating this Court of its jurisdiction or of depriving the plaintiff of any property rights in the said stock, and alleges the fact to be that the plaintiff has no property rights in said stock.

Par. 8. The defendant denies paragraph 3 in plaintiff's petition, and alleges the fact to be that her application for [devorce] is not made in good faith, but is made through spite and vindictiveness, and the defendant is informed and alleges the fact to be that it is not made with the inten-
72 tion of securing a divorce, and, that she purposely and
in bad faith alleges to this Court that this defendant has failed to provide for her and her minor child, and she has in fact concealed from this Court in her original petition the fact that two years ago this defendant conveyed in trust for her benefit the only sure and tangible property that he possessed, which property guarantees to her throughout the balance of her life that she shall receive $600.00 in cash on the first day of every month, a more specific statement as to this conveyance in trust being hereinafter set out.

Par. 9. The defendant denies paragraph 13 in plaintiff's petition in which she alleges that the business of the F. W. Fitch Company was organized and developed by the joint efforts of plaintiff and defendant, but alleges the fact to be that it was organized and developed despite her bitter opposition and against her often repeated protest up until the time it became evident that the defendant was making of it a financial success.

Par. 10. For the purpose only of disclosing to this Court the absence of equity in the plaintiff's claims and prayer for alimony, attorney fees, Court costs and corporate stock, the defendant states:

That at the time and subsequent to the marriage of plaintiff and defendant, the defendant owned a small barber shop and began, in a very small way, to build up a hair tonic business while conducting his shop. When the defendant reached the point where he felt he could safely discontinue the barber business and devote his time to making and selling hair tonic, the plaintiff gave spirited opposition thereto upon the grounds that the hair tonic business was disgraceful, undignified and would cause her to lose standing with her friends.

Working alone in the defendant's barber shop, he was at first not always able to be at home promptly when
73 meals were ready. The plaintiff thereupon began to
complain, find fault and nag. Disagreements started and have been continuous since, with the plaintiff finding fault with the defendant's business, unwilling to co-operate while the business was small because of the disgrace its character brought upon her, and when it became large and prosperous, making unreasonable demands upon the defendant to supply her various relatives with employment, positions, sinecures, and money regardless of their ability or competency.

When the business was very small, the plaintiff's health being poor, the defendant did the family washing and made every personal sacrifice of that character and otherwise to save money with which to build it up, and when it began to grow and the defendant would go out on the road to sell his products, drawing barely the money necessary for road expenses, the plaintiff would demand an equal amount to spend in the activities of the W. C. T. U., and Prohibition cause, etc.

When the defendant had succeeded despite the plaintiff's opposition and lack of cooperation by virtue of continuous effort at the [expnse] of his health and nerves to make his business national in its scope, the plaintiff became exacting in her demands, ambitious to be known as a woman of affairs, desirous that the children of plaintiff and defendant should not learn to work and accomplish, but be placed upon allowances, and she maintained the attitude after the business was established that it just came to the defendant as a matter of course and would go on regardl ss of executive ability and foresight, and she interfered with its management and policies and nothing the defendant could do would please her either in domestic affairs or business; although a good woman morally, she was demanding, exacting, nagging, suspicious and unreasonable until, with the defendant's

business cares and ill-health, in desperation the sepa-
74 ration of plaintiff and defendant became inevitable; because of her actions as a contributing cause, the defendant suffered a nervous breakdown in the year 1909, underwent a serious operation, became an invalid for four years, compelled to have the care and attention of nurses a great deal of the time, and will be able to live in the future only by the strictest adherence to the instructions of physicians and surgeons as to the manner and method of living.

That in the year 1917 when, as plaintiff alleges in paragraph 4 of her petition, the plaintiff and defendant separated, the company suffered a heavy loss, the financial burden was a crushing one and the defendant requested the plaintiff to cooperate with him in economizing, explaining to her his confidence in being able to retrieve the situation and place the business upon a firmer bases, and she refused cooperation and continued to spend money lavishly and complained as she now complains in her petition, though receiving $600.00 cash each month, that she did not have enough to live properly in accordance with her supposed station in life.

That throughout the married life of plaintiff and defendant, this defendant has been economical while the plaintiff has spent money lavishly, it costing this defendant from three to five times as much for her support as for his own.

That after the defendant had nevertheless succeeded in pulling the company through and establishing it on a firmer foundation, on the .... day of December, 1922, she filed a petition in this Court for separate maintenance, being docketed in this Court as Lettie S. Fitch vs. F. W. Fitch, Equity No. ......, which by this reference is made a part hereof, and on or about the 23rd day of April 1923, this defendant settled the said suit with her by a trust agreement, being executed and filed in the Recorder's office of this County, and being found in Book 870 on Page 502 of the Records of the Recorder of this County, which, by this ref-
75 erence is made a part hereof, and a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, by the terms of which the large factory building which houses the F. W. Fitch Company and was and is the only sure and tangible property the defendant owned except the stock in the Fitch Company, was deeded in trust to the Bankers Trust Company of this City for the plaintiff, the children and the defendant's benefit, and by the terms of which she receives $600.00 in cash on the first day of each month throughout the balance of her life, and thereafter the

said $600.00 per month does, by its provisions, go to the children of plaintiff and defendant. She is now and was receiving this $600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner. In the settlement of this suit referred to for separate maintenance, the defendant paid to the plaintiff's attorney a large attorney's fee, and in the present suit plaintiff is fully able to pay her own attorneys, and this defendant ought not in equity to be required to pay her attorneys anything.

This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other.

Par. 11. As to paragraph 10 of the plaintiff's petition, the defendant denies the conclusions therein drawn as to the actual value and earnings of the shares of stock. The defendant alleges the fact to be that while the defendant owns and controls 2182 shares of stock in the F. W. Fitch Company, that the same constitutes all of the assets and
76 property that this defendant possesses other than his interest in the trust agreement referred to. The value of this stock depends entirely upon the success or failure of the F. W. Fitch Company. That the hair tonic business does not consist of the manufacture and sale of what is commonly termed a staple product, but is built upon advertising and distribution under proper management and executive ability. That it is a fluctuating business and the profits are uncertain and spasmodic and numerous failures result. That there is only one concern of its kind existing in the world today that was in existence when this defendant started to manufacture. The business is peculiarly subject to state and national legislation, and its success and scope of activity depends alone upon the persons in charge.

Par. 12. That the plaintiff, in asking this Court to award to her all of the stock owned by the defendant in the Fitch Company, is asking for all of the property that this defendant owns, and in asking for $170,000 besides, she is pursuing the usual course that she has pursued throughout the married life of plaintiff and defendant, that is to say, asking for everything and conceding little.

Par. 13. The defendant denies paragraph 7 in the plaintiff's Amendment to her petition, and alleges the fact to be that the said 1810 shares of stock, the transfer of which was made to the name of Gertrude Westburg, is the property of this defendant and said transfer was not made for the purpose of defrauding anyone, but was made by verbal trust in the presence of witnesses because of the condition of the plaintiff's health, and was made with instructions and verbal agreement in the presence of witnesses that in the event of the defendant's death, Gertrude Westburg should hold the stock in trust for the sole benefit of the children of the plaintiff and defendant.

77 Wherefore, the defendant, having answered, asks that the attachments and garnishments herein issued be dismissed, and that the plaintiff's application for a judgment against the defendant for $175,000 or any other amount be dismissed, and that her application for attorney fees and for costs be dismissed, and her application for corporate stock or any interest therein be dismissed, and for such other and further relief as may be equitable in the premises.

C. C. PUTNAM,
GUY S. CALKINS,
Attorneys for Defendant.

State of Nevada,
County of Washoe—ss.:

I, Fred W. Fitch, being first duly sworn according to law depose and say that I am the defendant in the above entitled cause; that I have read the above and foregoing Answer, and that the statements therein contained are true as I verily believe.

FRED W. FITCH.

Subscribed and sworn to before me by the said Fred W. Fitch, this 17th day of July, A. D. 1925.

A. R. SHEWALTER,
Notary Public, in and for said County and State.

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78 Separate Answer of Gertrude Westburg.

In the District Court of Iowa, In and for Polk County.

Lettie S. Fitch, Plaintiff,
Divorce No. 2550. vs.
F. W. Fitch and Gertrude Westburg, Defendants.

Comes now the defendant, Gertrude Westburg, and answers the amendment to plaintiff's petition, and shows to the Court:

Par. 1. That the defendant admits that she is a resident of the City of Des Moines as set out in paragraph 2 of plaintiff's petition.

Par. 2. Defendant denies paragraph 3 of plaintiff's petition and alleges the fact to be that at no time has she ever entered into any agreement, conspiracy or understanding with the defendant, Fred W. Fitch to secure the ownership of any shares of stock in the Fitch Company, nor has she ever secured any shares of stock in the Fitch Company by any such agreement or conspiracy, nor has she ever intended or attempted to do anything in any manner designed in any way to interfere with any claimed rights that the plaintiff may have in the defendant, Fred W. Fitch's stock in said corporation.

Par. 3. The defendant Gertrude Westburg disclaims any property interest in any of said 1810 shares of stock as alleged in plaintiff's petition, and never has claimed any property interest therein.

Par. 4. The defendant denies that she has any property interest in said stock whatever, and denies each and all of the allegations made in the amendment to plaintiff's petition so far as they may apply to this defendant.

79 Wherefore the defendant Gertrude Westburg asks that as to her the plaintiff's petition and amendments thereto be dismissed at the plaintiff's costs.

C. C. PUTNAM,
GUY S. CALKINS,
Attorneys for defendant,
Gertrude Westburg.

State of California,
City and County of
San Franciso—ss.

I, Gertrude Westburg, being first duly sworn according to law depose and say that I am one of the defendants in the above entitled cause; that I have read the foregoing Separate Answer; that the statements thereof and the allegations therein contained are true as I verily believe.

GERTRUDE WESTBURG.

Subscribed and sworn to before me this 18th day of July, A. D. 1925.

VIRGINIA A. BEEDE,
Notary Public.

(Seal)

80 Amendment to Answer

In the District Court of Iowa, in and for Polk County.

Lettie S. Fitch, Plaintiff,
Divorce No. 2550 vs.
Fred W. Fitch, Defendant.

Comes now Fred W. Fitch, defendant, and amends his answer in the above entitled cause by striking out paragraph 13 thereof and inserting in lieu thereof the following:

Said defendant denies paragraph Seven in the plaintiff's amendment to her petition and alleges the fact to be that the said 1810 shares of stock is and at all times has been the property of this defendant; that a verbal conditional transfer of the same was made in March, 1925 to the name of Gertrude Westburg as agent and bailee of this defendant, not for the purpose of defrauding anyone but subject to the said stock being returned to this defendant upon his demand, and for the reason that he was about to leave Des Moines for Reno, Nevada, that he was in poor health at that time and was apprehensive that he might not return therefrom alive; that said transfer was made subject to the condition that this defendant should not return alive from Nevada within twelve months and was not to be effective if he did so return; that it was only in the event of this defendant's death before his return from Nevada to Des Moines that a trust of said stock was to be created for the benefit of defendant's children; that in fact no trust was executed or created of said stock; that the certificates of said stock were never at anytime out of this defendant's possession or control or ownership.

Defendant further states that thereafter in the month of March 1925, he went to Reno, Nevada, that he remained there several months and returned therefrom to Des Moines about Oct. 1st, 1925.

81 Defendant further states that upon his return from Reno, Nevada, to Des Moines he notified the said Gertrude Westburg of his return and of the fact that the condition upon which the trust of said stock was to be created or executed had not occurred and that he would continue his possession control and ownership of said stock.

Wherefore Defendant pray as in his original answer.

C. C. PUTNAM
GUY S. CALKINS
Attorneys for Defendants.

State of Iowa
Polk County—ss.:

I, Fred W. Fitch, being duly sworn on my oath state that I am the Defendant in the above entitled cause, that I have read the foregoing amendment to answer and know the statements therein contained and the same are true as I verily believe.

FRED W. FITCH

Subscribed and sworn to before me by the said Fred W. Fitch this 15th day of December A. D. 1925.

C. C. PUTNAM
(Seal) Notary Public.

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82 Exhibit D

Decree

In the District Court of the State of Iowa in and for Polk County

Lettie S. Fitch
Divorce 2550-5 vs.
Fred W. Fitch and Gertrude Westberg

Now on this 17th day of December, 1925, this matter comes on for hearing before the cpurt, the plaintiff appearing in person and by her attorneys, Clark & Byers and Gregory Brunk, and the defendants having heretofore appeared in this cause and filed their separate answers herein, being represented by their attorneysm C. C. Putnam and Guy S. Calkins, and it appearing to the court that the parties, Lettie S. Fitch and Fred W. Fitch, have entered into an agreement of settlement of all of their property matters and alimony without the aid of the court, and that the agreement has been performed and division of the property and provisions for alimony made in accordance therewith; and defendant Fred W. Fitch's answer as amended being now withdrawn in open court, this matter proceeds to final determination upon the allegations of the plaintiff's petition as amended and the evidence and proofs introdnced by the plaintiff in support thereof, and the court having heard the evidence, and being fully advised in the premises, finds that the plaintiff is entitled to the relief prayed for in her petition as against Fred W. Fitch, and is entitled to an absolute divorce, and is entitled to the property and alimony settlement.

Paragraph 2.

It Is, Therefore, Ordered, Adjudged and Decreed, that the plaintiff, Lettie S. Fitch, be, and she is hereby, divorced from the defendant, Fred W. Fitch, absolutely; and that she be and is hereby, restored to all the rights, privileges and immunities of a single and unmarried woman; that she be, and is given the permanent care and custody of her minor son, Lucius W. Fitch; that the trust agreement which is referred to in the defendant's answer as having been entered
83 into between these parties on or about the 23rd day of April 1923, the same being recorded in Book 870 on Page 502 of the records of the Recorder of Deeds of Polk County, Iowa, be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is herebym confirmed by the court.

Paragraph 3.

It Is Further Ordered, Adjudged and Decreed, that plaintiff herein shall pay her own attorney's fees and the costs of this action.

Paragraph 4.

It Is Further Ordered, Adjudged and Decreed, that all attachments and garnishments heretofore issued and levied in this cause at the instance of the plaintiff bem and they are hereby, discharged and released, and the Sheriff of Polk County, be, and he is hereby, ordered and directed to discharge the same and to notify the Bankers Trust Company and the F. W. Fitch Company, both of Des Moines, Iowa, garnishees thereof, and to cancel his notations on the stock books of the F. W. Fitch Company and the Bankers Trust Company, and to release said attachments and garnishments thereon.

Paragraph 5.

It Is Further Ordered, that the petition of the plaintiff against the defendant Gertrude Westberg be, and it is hereby, dismissed on its merits at plaintiff's costs.

JOHN FLETCHER, Judge.

84 Clerk's Certificate

State of Iowa,
Polk County—ss.:

I, Fred Barkalow, Clerk of the District Court, within and for the County and State aforesaid, do hereby certify the

Divorce in the case of Lettie S. Fitch vs. Fred W. Fitch and Gertrude Westberg, same being Divorce No. 2550 in Docket 5, and recorded in Journal 1 on page 88—as full, true, correct and complete, as the same remains of record in my office.

(Seal)
U. S. Dist. Court
Polk County, Ia.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of March 1937.

FRED BARKALOW,
Clerk of said Court
By Albert J. Scalise
Deputy.

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85 (Praecipe for Transcript.)

Filed July 11, 1938, United States Board of Tax Appeals.

United States Board of Tax Appeals

F. W. Fitch, Petitioner
Docket No. 84748 vs.
Commissioner of Internal Revenue, Respondent

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Eighth Circuit, heretofore filed by the above-named petitioner:

1. Docket entries of the proceedings before the Board.
2. Petition filed on May 26, 1936.
3. Answer to petition filed on July 16, 1936.
4. Findings of fact and opinion of the Board, promulgated on January 12, 1938.
5. Order of redetermination, entered on March 10, 1938.
6. Petition for review filed on May 24, 1938.

86 7. Notice of filing petition for review, filed on May 24, 1938.

8. Stipulation of facts filed upon submission of case at Des Moines, Iowa, May 5, 1937.

9. Exhibits A, B, C and D referred to in, and filed with and as a part of the Stipulation of Facts.

10. Orders enlarging time for transmission and delivery of documents not included in record.

11. This Praecipe for Record.

12. Notice of filing this Praecipe for Record and the admission of service thereof.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

A. F. SCHAETZLE
Attorney for Petitioner.

Service of a copy of this praecipe is hereby admitted this 13th day of July, 1938.

J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Agreement to Praecipe

It is hereby stipulated by and between the parties through their respective counsel that the foregoing praecipe
87 for transcript constitutes a request for the entire record, required on appeal of this case to the Circuit Court of Appeals for the Eighth Circuit and the same is hereby approved by the undersigned attorney for the petition on review and by the undersigned J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue, respondent on review.

Dated: 7/7/38.

A. F. SCHAETZLE
Attorney for Petitioner on Review.

J. P. WENCHEL
Chief Counsel for Bureau of Internal Revenue.

88 (Notice of filing of Praecipe for Transcript.)

Filed July 14, 1938, U. S. Board of Tax Appeals.

To:
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

Please Take Notice that on the 9th day of July, 1938, the undersigned, attorney for F. W. Fitch, the petitioner in the above-entitled proceeding, has filed with the Clerk of the United States Board of Tax Appeals a Praecipe for Record, a copy of which is annexed hereto.

A. F. SCHAETZLE
Attorney for Petitioner

Dated: July 13, 1938.

Receipt of the foregoing notice of filing the Praecipe for Record and service of a copy of the praecipe herein mentioned is acknowledged this 13th day of July, 1938.

J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

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89 (Clerk's Certificate to Transcript.)

United States Board of Tax Appeals

Washington

F. W. Fitch, Petitioner,
Docket No. 84748 vs.
Commissioner of Internal Revenue, Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 88, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office

as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 26th day of July, 1938.

(Seal)
Board of Tax
Appeals, 1924.

B. D. GAMBLE
Clerk, United States Board of Tax Appeals.

Filed Sep 8 1938 E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in he Circuit Court of Appeals, viz:

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11306

F. W. Fitch, petitioner

vs.

Commissioner of Internal Revenue

Order of submission

March Term, 1939

Wednesday, March 15, 1939

This cause having been called for hearing in its regular order, argu- ient was commenced by Mr. A. F. Schaetzle for petitioner, continued y Miss Louise Foster, Special Assistant to Attorney General, for espondent, and concluded by Mr. A. F. Schaetzle for petitioner.

Thereupon, this cause was submitted to the Court on the transcript f the record from said Board of Tax Appeals and the briefs of ounsel filed herein.

Opinion

United States Circuit Court of Appeals, Eighth Circuit

No. 11,306.—March Term, A. D. 1939

F. W. Fitch, *Petitioner*

vs.

Commissioner of Internal Revenue, *Respondent*

On Petition to Review Decision of the United States Board of Tax Appeals

[April 25, 1939]

Mr. A. F. Schaetzle for Petitioner.

Miss Louise Foster, Special Assistant to the Attorney General Ir. James W. Morris, Assistant Attorney General, and Mr. Sewall y. Special Assistant to the Attorney General, were with her on the ief) for Respondent.

By leave of Court, Mr. William D. Mitchell, Mr. Harold B. Tanner and Mr. Rollin Browne filed a brief as amici curiae.

Before GARDNER and WOODROUGH, Circuit Judges, and OTIS, District Judge.

GARDNER, Circuit Judge, delivered the opinion of the court.

This case is before us on petition for review of a decision of the United States Board of Tax Appeals determining a deficiency in income taxes against the petitioner for the year 1933, in the sum of $1,555.58. The facts were stipulated, and hence, are not in dispute.

Petitioner, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch, to whom he was married in 1892. They lived together as husband and wife until 1917, at which time they separated. On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against petitioner. This suit was dismissed on April 7, 1923, after the parties had agreed upon a settlement. In accordance with the settlement, petitioner leased certain premises owned by him to the F. W. Fitch Company for ninety-nine years, at an annual rental of $12,000.00, and on April 23, 1923, joined his wife and the Bankers Trust Company as trustee, in the execution of a trust agreement, under which the trustee took title to the premises and an assignment of the lease to collect the rents and, after deduction of expenses, to pay to Lettie S. Fitch $600.00 a month during her life, and the balance of the annual income to the petitioner during his life. Provision was made further for the duration of the trust during the lifetime of both petitioner and Lettie S. Fitch and in any case for at least fifteen years, and for distribution of the income to the children of petitioner and his wife in case either should die prior to the termination of the minimum period. Petitioner irrevocably alienated the corpus, as well as any right to receive $600.00 per month provided for Lettie S. Fitch in favor of her and the children. Provision was made that upon the termination of the trust period, the corpus should be paid over to the children or their lineal descendants.

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against petitioner in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner. In his answer, petitioner alleged inter alia, that he had created the above-described trust for her benefit in settlement of the prior suit for maintenance and that "She is now and was receiving this $600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner," and that "This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other." On December 17, 1925, the court entered a decree, granting the wife an absolute divorce and

the custody of the minor son, and further adjudging, "That the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court."

Pursuant to this decree, petitioner transferred to Lettie S. Fitch 600 common shares of the F. W. Fitch Company, which, on December 31, 1925, had a book value of $77,959.80, and paid to her attorney the sum of $23,500.00, of which she received $8,000.00, the balance representing counsel fees and expenses.

During 1933, the trustee under the trust above described, distributed to Lettie S. Fitch $7,128.00, which the commissioner included in petitioner's taxable income. As forecast, the board upheld the commissioner, and the case is here on petition to review. It is the contention of petitioner: (1) that the trust agreement resulted in the conveyance of an irrevocable life interest to his former wife in discharge of his marital obligation; (2) that this in effect constituted a lump sum settlement made in connection with divorce proceedings; (3) that by reason of the execution of this trust agreement and its adoption and confirmation by the court, the petitioner was under no legal obligation or liability for the support of his divorced wife during the tax year in question, and hence, the income received by his wife was not taxable to him.

Whether or not petitioner was under any legal liability for the support of his wife during the tax year depends upon the construction to be given the contract and the effect of the decree under the laws of the State of Iowa. The jurisdiction of the Iowa court in the divorce proceeding is not questioned. The provisions of the code of Iowa relative to alimony are as follows:

"Section 10480—Showing—In making such orders (i. e., reference to maintenance during litigation and attachment) the court or judge shall take into consideration the age and sex of the plaintiff, the physical and pecuniary condition of the parties, and such other matters as are pertinent which may be shown by affidavits, in addition to the pleadings, or otherwise, as the court or judge may direct."

"Section 10481—Alimony—Custody of Children—Changes. When a divorce is decreed, the court may make such orders in relation of the children, property, parties, and the maintenance of the parties, as shall be right."

In the instant case, the parties settled their property rights out of court and this settlement was confirmed in the court's decree. Under this settlement there were transferred to Lettie S. Fitch 600 shares of the common stock of the F. W. Fitch Company, having a book value of $77,959.80, and there was paid to her attorney the sum of $23,500.00. In addition to this, she was given a life interest in the trust property to the extent of $600.00 per month, less administration expenses. She had previously received from her husband a home which he purchased for her in 1919, furnishings for said home, and

an automobile. At the time of the granting of the absolute divorce she, therefore, had this separate property, and under these circumstances a lump sum settlement was made by which she acquired the above described stock and cash to the amount of $23,500.00. When, therefore, the decree of absolute divorce was entered, the obligation for further support was discharged. Kraft v. Kraft (Ia.) 187 N. W. 449; Spain v. Spain (Ia.) 158 N. W. 529; Barish v. Barish (Ia.) 180 N. W. 724; Carr v. Carr (Ia.) 171 N. W. 785; McCoy v. McCoy (Ia.) 183 N. W. 377.

In Kraft v. Kraft, supra, the court, among other things, said:

"The effect of the decree was, we think, so far as defendant is concerned, to award her a lump sum out of her husband's estate. We held in Spain v. Spain, 177 Iowa, 249, 158 N. W. 529, L. R. A. 1917D, 319, Ann. Cas. 1918E, 1225, that the court has no inherent power to modify a decree of divorce as regards alimony, nor power to so modify, except for such fraud or mistake as would justify a modification or change of any judgment and that a decree of divorce silent as to any alimony cannot thereafter be so modified as to provide for alimony, even though there is a showing of change in financial condition."

In McCoy v. McCoy, supra, in an opinion by Chief Justice Evans, it was said:

"The general ground upon which these holdings are based was that alimony is an incident of the marriage relation; that it can only be allowed where the marriage relation exists; that it may be allowed as a part of the decree of divorce; that the severance of the marriage relation by absolute decree without alimony terminates the right to alimony."

We think the right to further alimony was absolutely precluded by the decree of divorce which dissolved the marriage status, and hence, removed the duty or obligation of the petitioner further to support his former wife.

The general rules for the taxation of trust income are to be found in Sections 161, 162, 166, and 167 of the Revenue Act of 1932. Under these provisions the trust is treated as a taxable entity. The trustee is subjected to tax on the net income computed on the same basis as in the case of an individual, except that a deduction is allowed for all income distributed or distributable to the beneficiaries, who are required to include the amount so distributed to them in computing their own income. We are of the view that Lettie S. Fitch is a true trust income beneficiary and as such liable to the income tax thereon. Irwin v. Gavit, 268 U. S. 161; Blair v. Commissioner, 300 U. S. 5.

In the instant case, it is contended that under the doctrine of Douglas v. Willcuts, 296 U. S. 1, the income from this trust going to petitioner's divorced wife was taxable to him, but we think the case is readily distinguishable. It was held in that case that there was a continuing obligation of the trust grantor to the beneficiary of the

trust and that the income of the trust was merely used to satisfy that obligation. There is, of course, no doubt as to the soundness of this principle. Otherwise, a debtor could evade income taxes by the simple device of creating trusts with directions to apply the income to the payment of his obligations. But here, as we have seen, there was no continuing obligation to petitioner's divorced wife, and neither by the decree nor the statutory provisions of Iowa, was there any legal liability for support. Confessedly, there was such an obligation up to the time of entry of decree, but this was extinguished when the absolute decree of divorce was entered. It is to be observed that under the trust agreement the annual distribution made to petitioner's divorced wife was the trust income and nothing but trust income. In other words, she was not entitled to a fixed amount per annum, payable out of trust income, with deficiencies to be made up out of the corpus or otherwise. In the Douglas case, the legal liability to his wife continued throughout the tax year because he expressly agreed that if the trust income should fall below $15,000.00 in any year, he would make up the deficiency, and the divorce decree confirmed that liability. In addition to this, the law of Minnesota continued his liability for the support of his divorced wife and vested a continuing jurisdiction in the courts to supervise and revise both the decree and the trust agreement to that end. So, too, in Helvering v. Lucy Blumenthal, 296 U. S. 552, relied upon by the commissioner, the grantor remained personally liable for the bank loan, to the satisfaction of which the trust income was directed to be devoted. In Helvering v. Schweitzer, 296 U. S. 551, and Helvering v. Stokes, 296 U. S. 551, there was a continuing liability in the grantors not superseded by the trusts involved. In Commissioner v. Hyde, 82 Fed. (2d) 174, and Glendinning v. Commissioner, 97 Fed. (2d) 51, the grantors were held liable by reason of their express agreements to make up deficiencies in the trust income. In Helvering v. Coxey, 297 U. S. 694, a divorce had been granted under the laws of New Jersey, and under those laws the husband was obligated to support his wife even after divorce. N. J. Rev. Statutes, Sec. 2:50-37; McKensey v. McKensey, 65 N. J. Eq. 633, 55 Atl. 1073; Greenberg v. Greenberg, 99 N. J. Eq. 461, 133 Atl. 768. The conflict in the decisions is apparent, rather than real.

The case of Helvering v. Brooks (C. C. A. 2), 82 Fed. (2d) 173, is strongly relied upon as sustaining the decision of the Board of Tax Appeals in the instant case, but the Brooks case arose in the State of Florida, and under the law of that state the husband remained liable for the support of his divorced wife, and the court retained jurisdiction over the matter, with the power at any time by supplemental decree to alter the provisions of the trust agreement with respect to the wife's support. So, too, in Alsop v. Commissioner (C. C. A. 3), 92 Fed. (2d) 148, the grantor remained liable to his divorced wife during the tax year, by reason of an express agreement to make up deficiencies in the trust income so as to as-

sure her receiving a fixed amount each year. In the instant case, however, there was absolutely no continuing obligation on the part of the petitioner for the support and maintenance of his divorced wife.

The facts in Commissioner v. Tuttle (C. C. A. 6), 89 Fed. (2d) 112, are analogous to those in the instant case. It was there insisted that under the doctrine of Douglas v. Willcuts, the husband was liable to income tax arising from a trust for his divorced wife pursuant to settlement agreement made in contemplation of divorce. In the course of that opinion it is, among other things, said:

"Careful consideration of Douglas v. Willcuts leads to the conclusion that decision was based on the fact that the income of the trust estate was alimony under the provisions of the Minnesota statute and the terms of the decree. By the statutes of Minnesota the court is empowered upon divorce to decree part of the husband's estate to the wife, and also such alimony as it may deem just and reasonable. * * * It may from time to time revise and alter the decree with respect to the alimony or allowance, and also with respect to the appropriation and payment of principal and interest of property held in trust, and in exercising this authority it is not precluded by stipulations and agreements of the parties."

The court proceeds to say that—

"Under the Michigan law, however, parties to a divorce action may enter into a property settlement by which, in the absence of fraud, duress, or mutual mistake they will be bound. * * *

"It was competent for the parties to enter into the terms of a settlement agreement in contemplation of divorce. Such agreement is recognized as final and conclusive between the parties in the absence of fraud, duress, or mistake, and its efficacy as well as its finality springs not from the order of the court but from the consent of the contracting parties. It may not thereafter be amended or revised by the court. * * *

"It cannot be doubted that in making a settlement with his wife in contemplation of divorce under Michigan law the respondent might have paid her a lump sum in money, or deeded to her certain property. The rentals from such property, or the return on the money if invested, would be her income and not his. Or he might have settled upon her a life estate in property. Its income would not thereafter be his income. If he had bought for her an annuity, its avails would likewise be her income. We are unable to distinguish from these examples an irrevocable assignment for life without limitation or restraint of the total income of specified securities.

"Another important distinction between the present case and Douglas v. Willcuts, supra, is this: The settlement there provided for a specified payment in money through the trustee to the wife. Payment was secured by the transfer of securities in trust. The transfer was but for security, however, since deficiencies were to be made up by the settlor and excess income was to be paid to him. Finality

was not achieved by the agreement. Here the transfer, so far as it operates, is absolute. There is no guaranty of return, no obligation to make up deficiency, no reservation of excess income, no right retained to change or substitute securities. The wife definitely and finally accepted the income from a certain amount of property, whatever it might prove to be, in settlement of her claims to dower and other rights. There remained no continuing obligation on the part of the respondent for support and maintenance, no debt to be paid out of his income, either actually or constructively. Upon the creation of the trust the trustor's obligations to his wife under both the contract and the decree were fully and finally liquidated."

We are in accord with these views as applied to the facts and issues in this case. The decision of the Board of Tax Appeals is therefore reversed and the cause is remanded for further proceedings consistent herewith.

Woodrough, Circuit Judge.

I dissent because it seems to me that Douglas v. Willcuts, 296 U. S., page 1, requires us to affirm.

Decree

United States Circuit Court of Appeals, Eighth Circuit

No. 11306

March Term, 1939

Saturday, April 29, 1939

F. W. Fitch, petitioner

vs.

Commissioner of Internal Revenue

On Petition to Review Decision of United States Board of Tax Appeals

This cause came on to be heard on the petition for review of a decision of the United States Board of Tax Appeals determining the deficiency in income taxes against the petitioner for the year 1933, in the sum of One Thousand Five Hundred Fifty-five and 58/100 ($1,555.58) Dollars, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Board of Tax Appeals be, and the same is hereby, reversed without the taxation of costs in favor of either of the parties in this Court.

And it is further ordered by this Court that this cause be and the same is hereby remanded to the said Board of Tax Appeals for further proceedings consistent with the opinion of this Court filed herein April 25, 1939.

April 29, 1939.

Clerk's certificate

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the record on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true, and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein F. W. Fitch was Petitioner and the Commissioner of Internal Revenue was Respondent, No. 11306, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the seventeenth day of May, A. D. 1939, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the United States Board of Tax Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-first day of July, A. D. 1939.

[SEAL]

E. E. Koch,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

U. S. GOVERNMENT PRINTING OFFICE 1939

Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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No. — 243

In the Supreme Court of the United States

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

F. W. FITCH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

F. W. FITCH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on April 25, 1939, reversing a decision of the Board of Tax Appeals and remanding for further proceedings in conformity with its opinion.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 10-13) is unreported. The opinion of the Circuit Court of Appeals is reported in 103 F. (2d) 702.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 25, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether payments made to the respondent's divorced wife from the income of a trust which was created by him for her maintenance and support and which was ratified in the divorce decree should be included in respondent's taxable income, even if the state court lacked power to award further alimony.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in Appendix A, *infra*, pp. 16–17.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 10–12) and stipulated by the parties (R. 19–61) are substantially as follows:

Taxpayer, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch, to whom he was married in 1892. They lived together as husband and wife until 1917, and had four children. In that year they separated. In 1919, taxpayer purchased a home for his wife, at a cost of $5,000, furnished it for her, and gave her an automobile. In the same year the F. W. Fitch Company was

incorporated, and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1,860 were issued to taxpayer and 10 to his wife, who was elected vice president and a director of the corporation; and by reason of taxpayer's control, she received from it \$300 a month although she had no regular hours of employment and did not devote much time to its affairs. (R. 10.)

On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against taxpayer in the District Court of Polk County, Iowa. This suit was dismissed on April 7, 1923, after the parties had agreed upon a settlement. In accordance with the settlement, taxpayer leased certain premises, owned by him, to the F. W. Fitch Company for 99 years at an annual rental of \$12,000, and on April 23, 1923, joined his wife and the Bankers Trust Company as trustee in the execution of a trust agreement, under which the lease was transferred to the trustee to hold title, collect the rents, and after the deduction of expenses to pay to Lettie S. Fitch \$600 a month during her life and the remainder to taxpayer during his life. Provision was made further for the trust's duration for at least 15 years and for distribution of the income to the children of taxpayer and his wife in case either should die prior to the termination of the minimum period. Upon creation of this trust, the terms of which have been and are now being substantially complied with, the wife ceased to be an officer and

director of the F. W. Fitch Company, and received no further payments from it. (R. 10–11.)

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against taxpayer in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner, and praying for the custody of the child, the only one then a minor, and for a money judgment against taxpayer. In his answer taxpayer alleged, *inter alia*, that he had created the above trust for her benefit in settlement of the prior suit for maintenance; that (R. 11):

> * * * She is now and was receiving this $600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner. * * *

and that (R. 11):

> This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other.

On December 17, 1925, the court entered a decree finding (R. 59)—

> that the plaintiff is entitled to the relief prayed for in her petition as against Fred W. Fitch, and is entitled to an absolute di-

> vorce, and is entitled to the property and alimony settlement.

The decree granted the wife an absolute divorce and the custody of the minor son and further provided (R. 11–12):

> * * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Pursuant to this decree taxpayer transferred to Lettie S. Fitch 600 common shares of the F. W. Fitch Company, which on December 31, 1925, had a book value of $77,959.80 and paid to her attorney the sum of $23,500, of which she received $8,500 and the balance represented counsel fees and expenses (R. 12).

During 1933 the trustee under the trust of April 23, 1923, distributed to Lettie S. Fitch $7,128, which the Commissioner included in taxpayer's taxable income (R. 12).

The Board held the doctrine of *Douglas* v. *Willcutts*, 296 U. S. 1, applicable, upheld the Commissioner, and found a deficiency in tax of $1,555.58 (R. 13). Upon appeal, the Circuit Court of Appeals, one judge dissenting, held the case of *Douglas* v. *Willcutts* distinguishable, and ordered that the decision of the Board of Tax Appeals be reversed and the cause remanded.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In excluding from the gross income of the respondent income paid to his divorced wife pursuant to the provisions of a trust established by respondent for her maintenance and support, which trust was ratified and confirmed in a divorce decree.

(2) In failing to hold respondent taxable under the doctrine of *Douglas* v. *Willcutts*, 296 U. S. 1, upon the said income, as income paid out to his wife under a trust created by him to discharge his legal obligation to support her.

(3) In holding that the considerations that the alimony trust may not, subsequent to the divorce decree, be modified by the state court and that the settlor has not agreed to make up deficiencies in the income render the doctrine of *Douglas* v. *Willcutts* inapplicable.

(4) In failing to hold that the Iowa courts have power to award further alimony against respondent.

(5) In failing to affirm the decision of the Board of Tax Appeals, and in reversing that decision and remanding the cause.

REASONS FOR GRANTING THE WRIT

1. The decision below fails correctly to apply the principle stated in *Douglas* v. *Willcuts*, 296 U. S. 1. In that case, in a decree of divorce, the Minnesota court adopted a provision agreed to by the parties

whereby the husband conveyed to a trustee certain securities from the income of which the wife, during her lifetime, was to receive annual payments in full settlement of alimony and dower rights and in lieu of claims for maintenance and support. This Court held that the trust agreement was made a part of the state court's decree of alimony, that the taxpayer had an obligation under the decree "to devote the income in question, through the medium of the trust, to the use of his divorced wife," and that the income was included within the taxpayer's gross income, under the broad definition of Section 22, since (p. 9):

> In the present case, the net income of the trust fund, which was paid to the wife under the decree, stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payment directly.

The instant case presents an almost identical situation. Respondent conveyed to a trustee certain property for a term of fifteen years, from the income of which, during her lifetime, his wife was to receive payment of $600 per month. The trust was established, in settlement of a suit for separate maintenance, for her maintenance and support. And in the present case there was also approval of the trust by the divorce court, although this element was not essential to the decision in *Douglas* v. *Willcutts* (see *Helvering* v. *Coxey*, 297 U. S. 694, reversing 79 F. (2d) 661 (C. C. A. 3d)). In

granting the divorce the state court, which could have made further provision for the support of the wife as prayed in her complaint,[1] was apparently convinced by the taxpayer's answer as to the sufficiency of the amounts payable to his wife under the trust (R. 51, 54–55; 11). In its decree, the court (R. 59–60; 11–12) recited that the parties had "entered into an agreement of settlement of all of their property matters and alimony without the aid of the court," found the plaintiff entitled to a divorce and "entitled to the property and alimony settlement," and decreed—

> * * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

To paraphrase the opinion in *Douglas* v. *Willcutts*, it seems clear that the decree confirms and embodies respondent's obligation to devote the income in question, through the medium of the trust, to the use of his wife, and that the income stands substantially on the same footing as though respondent had received the income personally and been required by the decree to make the payment directly. As Circuit Judge Woodrough said in his note of dissent, the case of *Douglas* v. *Willcuts* required the court below to affirm.

[1] Iowa Code 1935, Sec. 10481, *infra*, Appendix A.

The court below distinguished *Douglas* v. *Willcutts* as follows:

> In the *Douglas* case, the legal liability to his wife continued throughout the tax year because he expressly agreed that if the trust income should fall below $15,000.00 in any year, he would make up the deficiency, and the divorce decree confirmed that liability. In addition to this, the law of Minnesota continued his liability for the support of his divorced wife and vested a continuing jurisdiction in the courts to supervise and revise both the decree and the trust agreement to that end.

We submit that the court emphasized elements not crucial to the result in *Douglas* v. *Willcutts*. It is true that in reciting the facts this Court did state that deficiencies in the trust income up to a certain amount were to be made up in a prescribed manner (296 U. S. at 3). And this Court did make reference to the power of the Minnesota court to revise its original divorce decree (296 U. S. at 6-7), in the course of a general discussion of the state law establishing the conclusion that the trust was not related solely to the contract of the parties, but was created in discharge of a legal obligation imposed by a court not bound by the trust agreement. But these considerations do not necessarily limit the doctrine of the case.

We may assume, for purposes of argument, that subsequent to the divorce decree the state court could not order respondent to make additional pay-

ments to his wife.[2] It suffices, to show the applicability of *Douglas* v. *Willcutts,* that the trust was established as a means of carrying out the obligation of the taxpayer, whether or not that obligation can be increased. Although under Iowa law a man is under no general duty to support a divorced wife it is plain enough that the court decreeing the divorce may determine upon an obligation of future maintenance and make an appropriate order. *Spain* v. *Spain,* 177 Iowa 249. Where a court determines that the income from a specified trust established by the husband is adequate provision for such maintenance, the subsequent application of that income carries out that obligation, and is taxable to the husband. It is no less his obligation because, after devoting an income well in excess of the obligated payments to their discharge, he is under no duty to make good any hypothetical deficiency. Nor is such taxation precluded by the general doctrine that a transfer of income from a trust is equivalent to a conveyance

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[2] If certiorari is granted, we shall present an alternative argument disputing this proposition of state law. Under Iowa Code, sec. 10481, when a divorce is decreed the court may make such order in relation to the property and maintenance of the parties as shall be right, and may make subsequent changes when circumstances render them expedient. Even if the confirmation of the trust is regarded as equivalent to a lump-sum award of alimony, it is not settled that the divorce court may not order further payment. Cf. *McNary* v. *McNary,* 206 Iowa 942, 945; *Goldsberry* v. *Goldsberry,* 217 Iowa 750; *Handsaker* v. *Handsaker,* 223 Iowa 462.

of property, rendering future income taxable to the transferee. In *Blair* v. *Commissioner,* 300 U. S. 5, the Court expressly put to one side cases such as *Douglas* v. *Willcutts*, as turning upon the application of the income to the discharge of the taxpayer's obligation (see 300 U. S. at 11).

2. This petition should be granted in view of the uncertainty and diversity in the reception by the lower courts of the opinion in *Douglas* v. *Willcutts.* The court below followed the decision in *Commissioner* v. *Tuttle,* 89 F. (2d) 112 (C. C. A. 6th), where the court held the taxpayer not taxable on income paid to his former wife upon a trust created by him during the pendency of divorce proceedings, upon the ground that the trust represented a property settlement, that under state law the Michigan courts could not increase the payments made by the husband. That decision distinguished *Douglas* v. *Willcutts* as involving a trust wherein the grantor agreed to make up deficiencies in the trust income, and as arising in a state whose courts had continuing power to revise the allowance to the wife. This decision was then in probable conflict with the principle stated in *Helvering* v. *Brooks,* 82 F. (2d) 173 (C. C. A. 2d), followed in *Commissioner* v. *Hyde,* 82 F. (2d) 174 (C. C. A. 2d), where the court stated that there was no substance in a distinction asserted between an agreement to pay alimony and an agreement for the settlement of property rights between husband and wife.

No cognizance was taken of the doctrine evolved in the *Tuttle* case in other cases holding a husband taxable upon income paid to a divorced wife under a trust created to satisfy the obligation of the husband to support and maintain his wife. *Alsop* v. *Commissioner,* 92 F. (2d) 148 (C. C. A. 3d), certiorari denied, 302 U. S. 767, rehearing denied, 303 U. S. 666; *Glendinning* v. *Commissioner,* 97 F. (2d) 51 (C. C. A. 3d); *Donnelley* v. *Commissioner,* 101 F. (2d) 879 (C. C. A. 7th), certiorari denied, June 5, 1939, No. 938, October Term, 1938. In the *Alsop* case the court pointed out that the husband had to meet the question of discharging his obligation to support his wife, and that alimony paid would have been taxable to him, and continued (p. 149):

> He could have discharged his obligation by paying her a stipulated sum, but he did not do this. He chose rather to take the chance of forever relieving himself of the obligation to support her by the creation of a trust which with its provisions stood in the place of his obligation.

And in *Glendinning* v. *Commissioner, supra,* the court held the husband taxable upon income paid to his divorced wife from a trust created, as a substitute for a court order requiring payment to his then wife, prior to the divorce decree. It said (p. 51):

> Under the law of Pennsylvania this taxpayer was under no legal obligation to pay his divorced wife anything by way of alimony or otherwise. The law however permits and

upholds an agreement by the husband to pay. There is then an obligation, not imposed by law, but self imposed, to pay.

Recently, however, the Circuit Court of Appeals for the Second Circuit expressly overruled its opinion in the *Brooks* case and followed the decisions in the *Tuttle* case and the instant case. *Commissioner* v. *Leonard,* and *Fuller* v. *Commissioner,* decided June 30, 1939, reprinted *infra,* Appendix B, pp. 18–25. The court stated that it had at first failed correctly to interpret the decision in *Douglas* v. *Willcutts.* We intend to petition for certiorari in these cases.

Technically, the court decisions are distinguishable upon their facts.[3] *Helvering* v. *Coxey,* 297 U. S. 694, reversing 79 F. (2d) 661 (C. C. A. 3d), upholding taxation of the husband upon the income from a trust not referred to in the divorce decree, arose in New Jersey where the extent of the husband's liability to the divorced wife may be continually reexamined by the courts. See, also, *Commissioner* v. *Hyde, supra,* 175. Provisions of the trust requiring the husband to make up deficiencies in the trust income to a certain amount are found in the reports of the *Hyde* case (p. 175), the *Alsop* case (p. 148), and *Donnelley* case (p. 879). A similar provision is found in the record in the *Glendin-*

[3] It was because the facts made the application of *Douglas* v. *Willcutts* indisputable, and because the application of the doctrine of the *Tuttle* case would not have changed the result, that the Government opposed the petitions for certiorari in the *Alsop* case and *Donnelley* case.

ning case, but not in the opinion of the court. However, the technically distinguishing facts, not even noted in the *Glendinning* case nor made part of the reasoning in the other cases, do not negate the substantial conflict in principle.[4] The courts which decided the *Brooks, Hyde, Alsop,* and *Glendinning* cases seem plainly to have meant their opinions to stand for more than the facts before them, and would have affirmed the Board in the present case. In the *Leonard* case the court felt required to overrule its decision in the *Brooks* case. After noting that the Brooks case might be distinguished upon the basis of Florida law, the court said: "But we had nothing of the sort in mind, and the decision stands for more." It seems a matter of importance that this Court determine whether the decisions just mentioned or the *Tuttle* line of cases correctly interpret the doctrine of *Douglas* v. *Willcutts*.

3. Further indication of the importance of the present case is indicated by the volume of litigation involving the question. The Bureau of Internal Revenue advises that in the New York and Chicago offices of the Bureau there are pending 26 cases, involving 43 tax years, and taxes in excess of $411,000, and that in the Income Tax Unit in Washing-

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[4] The Board of Tax Appeals regards the *Tuttle* case as inconsistent with the *Brooks* and *Coxey* cases. *Goldring* v. *Commissioner*, 36 B. T. A. 779, 785; *Metcalf* v. *Commissioner*, 40 B. T. A. —, No. 34.

ton there are 10 cases, involving 24 tax years, with an undisclosed total amount of taxes. The question is pending before the Board of Tax Appeals in nineteen cases, involving $234,000. In this connection, it may be noted that on June 30, 1939, the Board stated (*Metcalf* v. *Commissioner*, 40 B. T. A. —, No. 34):

> *Fitch* v. *Commissioner* * * * is directly contrary to the result we reach here. * * * Despite our respect for that tribunal, we find ourselves unable to follow the reasoning of the Fitch case.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

GOLDEN W. BELL,
Acting Solicitor General.

JULY 1939.

APPENDIX A

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever. * * *

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 83. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. An amount of principal paid under a marriage settlement

is a gift. Neither alimony nor an allowance based on a separation agreement is taxable income. (See article 281.)

ART. 281. *Personal and family expenses.*— * * * Alimony and an allowance paid under a separation agreement are not deductible from gross income. * * *

Code of Iowa, 1935:

SEC. 10480. *Showing.*—In making such orders [relating to attachment], the court or judge shall take into consideration the age and sex of the plaintiff, the physical and pecuniary condition of the parties, and such other matters as are pertinent, which may be shown by affidavits, in addition to the pleadings or otherwise, as the court or judge may direct. [C73, Sec. 2228; C97, Sec. 3179; C24, 27, 31, Sec. 10480.]

SEC. 10481. *Alimony—custody of children—changes.*—When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.

Subsequent changes may be made by it in these respects when circumstances render them expedient. [C51, Sec. 1485; R60, Sec. 2537; C73, Sec. 2229; C97, Sec. 3180; C24, 27, 31, Sec. 10481.]

(The above provisions were part of the Iowa law at the time the divorce was granted in this case in 1925 and have remained the same since that time.)

APPENDIX B

United States Circuit Court of Appeals for the Second Circuit. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, against Stephen J. Leonard, respondent. Stephen J. Leonard, petitioner, against Guy T. Helvering, Commissioner of Internal Revenue, respondent. Before: L. Hand, Swan & Augustus N. Hand, circuit judges

On separate petitions by the Commissioner of Internal Revenue and the taxpayer to review an order of the Board of Tax Appeals, affirming in part and reversing in part, a deficiency assessed against the taxpayer for income taxes for the year 1929.

J. Donald Duncan for Leonard.

L. W. Post for Helvering, Commissioner.

L. Hand, Circuit Judge:

This case comes up upon appeals by the Commissioner and the taxpayer from an order of the Board of Tax Appeals, assessing a deficiency against the taxpayer for the year 1929. The facts are as follows: On December 27, 1928, the wife of Leonard, the taxpayer, who was already living apart from him, began a suit for divorce against him in New York. While this was pending, the spouses executed two instruments, a deed of trust and a separation agreement, both on June 4, 1929. The deed conveyed property worth about $650,000

to a trustee, which was to pay $5,000 annually to each of the couple's three children, and the remainder of the income to the wife; the other provisions of the deed are not relevant to this controversy. The separation agreement recited the deed and the expectation of both parties that the wife would receive an income of $15,000 from the trust and an equal sum from earlier gifts, so that she would have an invested income of $30,000 from all sources. To bring her total allowance for maintenance up to $65,000, Leonard promised to pay her $35,000 more, as a maximum, subject, however, to reduction to not less than $10,000, if he should later convince the divorce court that his means no longer justified any larger sum. In consideration of these provisions the wife agreed to assume all her living expenses, thus discharging the husband from his duty of support. The decree of divorce, which became absolute in October 22, 1929, incorporated the separation agreement, "approved and affirmed" it, and directed Leonard to pay his wife $35,000 "during the term of her natural life." Between June 4th and December 31, 1929, the trustee received income of $16,191.34 from the trust property, of which it distributed $5,200 to the wife, and five twelfths of $5,000—$2,083.33—to each of the three children, leaving an undistributed balance of income for that period of about $4,700. The Board assessed Leonard upon the income distributed to his wife and minor children on the theory that these payments were in discharge of his continuing marital and paternal duties, but refused to assess him upon the undistributed income. Both parties appealed.

So far as we have found, no case has ever arisen in which a husband has discharged his duty of

maintenance by the payment of a lump sum, but we are confident that in such a case any income, derived by the wife from the money received, would be assessed against her, regardless of the fact that the payment had relieved the husband pro tanto. Her income would be altogether beyond his control, its increase or decrease would not affect him at all, and it could be regarded as still his only by the most patent fiction. We see no difference, when, instead of a lump sum, the husband creates a trust in discharge of his duty; and in the only two cases where that situation has come before the courts, the income has been held to be taxable to the wife. *Commissioner* v. *Tuttle*, 89 Fed. (2) 112 (C. C. A. 6); *Fitch* v. *Commissioner*, 103 Fed. (2) 702 (C. C. A. 8). On the other hand such trusts will be only security if the husband's duty continues after decree, because the law or the decree reserves power to the divorce court to change its original award. *Douglas* v. *Willcutts*, 296 U. S. 1, was such a case. The spouses lived in Minnesota, by whose law the divorce court, not only was not bound by any agreement between them, but—and this was the critical fact—might later change the original allowance, if circumstances made it desirable. That was true also of *Helvering* v. *Coxey*, 298 U. S. 694, where the spouses lived in New Jersey, in which a settlement, though made with the wife's concurrence, does not end the power of the divorce court. *Greenberg* v. *Greenberg*, 99 N. J. Eq. 461. The question therefore is whether a decree in the state of the divorce terminates the husband's duty and substitutes finally the provisions which it incorporates. In New York §§ 1155 & 1170 of the Civil Practice Act do indeed give the divorce court

power to change allowances fixed in the original decree; and §.51 of the Domestic Relations Law forbids a wife's making an agreement discharging her husband's duty to support her. Nevertheless, a settlement made in discharge of the husband's duty is finally binding upon the parties to the divorce, if incorporated into the decree; and its terms will not be changed, unless the wife can disaffirm it for fraud, overreaching, or the like. *Galusha* v. *Galusha*, 116 N. Y. 635; S. C. 138 N. Y. 272; *Cain* v. *Cain*, 188 App. Div. 780; *Hamlin* v. *Hamlin*, 224 App. Div. 168. *Kunker* v. *Kunker*, 230 App. Div. 641, seems an exception to this doctrine, though it is not entirely clear on just what grounds the majority did proceed. If they meant to hold that the agreement, though unimpeached, is not conclusive, the decision seems to us at variance with the law as previously laid down.

In the case at bar, if the trust had been the only consideration for the discharge of Leonard's duty, the income would not, therefore, have been taxable to him: his liability would have ended with the decree, which the court could not have reopened, and the case would have fallen within *Commissioner* v. *Tuttle, supra*, and *Fitch* v. *Commissioner, supra*. The situation was not, however, quite as simple as that, for the settlement agreement added to the trust a promise to pay alimony which the court might change and fix between $10,000 and $35,000. The question therefore becomes whether this changed the trust into a partial security for a total allowance, made up of the present income of the trust and of so much as the court might from time to time allow, and whether this control over it brings the situation within *Douglas* v. *Willcutts, supra*.

We think it did not. It seems to us that the intent was that Leonard should never be obliged to make good any deficits caused by decrease in the trust income, or to be relieved by its increase; the original income was taken as the equivalent of a maintenance of $15,000, and discharged him pro tanto. That is the more natural view. Possibly, however, there may be an indirect relation between the trust income and the amount fixed in the future by the divorce court under the separation agreement. It is true that the agreement apparently makes the only test the husband's "circumstances and ability to pay," but that does not necessarily mean that nothing else will be considered. It may be that the wife's other means will also be deemed a factor, and in this way the income of the trust indirectly will determine the allowance. But that circumstance alone is not enough to make that income taxable to him; for if it were, the income from the earlier gifts would be similarly taxable, because that too was a factor in the original settlement. Moreover, consistently we should have to go a step farther, for it is the commoner practice in fixing alimony to take into consideration the wife's independent income from all sources. *Sullivan* v. *Sullivan*, 170 Mich. 557; *Dietrick* v. *Dietrick*, 88 N. J. Eq. 560. Obviously it would be absurd to tax the husband upon all this income, and it follows that a more direct correspondence is necessary than anything arising from the power reserved in the decree, even if, as we are disposed not to believe, the income of the trust was not for all purposes to be deemed an equivalent of $15,000.

We conclude therefore that the Board was wrong in assessing the husband for that part of the in-

come payable to the wife. In so holding, it seems to us that our decision in *Helvering* v. *Brooks,* 82 Fed. (2) 173, must be overruled. There we held that the income from a trust made in settlement with a wife, who was suing for divorce, was taxable to the husband. It is said that by the law of Florida—the place of the divorce—the divorce court had power later to change the allowance, as fixed in the settlement, to correspond with changes in the husband's means; and perhaps that was so. But we had nothing of the sort in mind, and the decision stands for more. *Douglas* v. *Willcutts, supra* (296 U. S. 1) was then new, and we assumed too readily—as we now think—that any income which in fact relieved the husband from alimony was to be regarded as still his. We failed to consider how carefully the opinion in that case had been based upon the Minnesota law, which continued the husband's duty, and in effect made the trust only a security for whatever the divorce court might from time to time allow. We are satisfied that the Supreme Court did not mean to extend the doctrine to situations where the husband's duty is at an end, and to assess him upon income over which he has no control, and in which he has no interest.

The same considerations do not apply to the income of the trust payable to the minor children. Pro tanto the trust was created in performance of Leonard's paternal duty of support, which he could neither commute nor discharge. The payments for 1929 seem to have been calculated on the assumption that nothing was due before August first. The settlement agreement fixed the first of the month next succeeding the date of execution as the "settlement date," but that would appear to have

been July first, and in any event the provision does not seem to apply to the deed of trust. The proper date would seem to be that on which the deed took effect; but the children were entitled only to that proportion of $5,000 which the remaining months bore to the twelve months. The tax will be assessed upon so much as was payable to the minor children so calculated; and the remainder of the deficiency will be expunged.

Order reversed; cause remanded.

United States Circuit Court of Appeals for the Second Circuit. Alfred C. Fuller, petitioner, against Guy T. Helvering, Commissioner of Internal Revenue, respondent. Before: L. Hand, Swan & Augustus N. Hand, circuit judges

On petition to review an order of the Board of Tax Appeals assessing a taxpayer upon his income for the years 1931, 1932, and 1933.

JOHN C. PARSONS for the petitioner.

L. W. POST for Helvering, Commissioner.

WILLIAM D. MITCHELL, amicus curiae.

PER CURIAM:

This case differs from *Helvering* v. *Leonard*, handed down herewith, only in that the divorce was granted in Nevada, and the trust was in full discharge of the husband's duty to support the wife. Under the law of Nevada a settlement of the kind here in question does not conclude the divorce court as to the wife's allowance, but the allowance once made is final (*Sweeney* v. *Sweeney*, 42 Nev. 431) unless the decree reserves power to the divorce court to modify it. *Lewis* v. *Lewis*, 53 Nev. 398; *Asltine* v. *Second Judicial District Court*, 62 Pac.

Rep. (2) 701. The decree of divorce contained no such reservation in the case at bar, and the settlement was a final discharge. The income from the trust was therefore taxable only to the wife.

Order reversed; deficiencies expunged.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

No. 243

In the Supreme Court of the United States

October Term, 1939

Guy T. Helvering, Commissioner of Internal Revenue, petitioner

v.

F. W. Fitch

On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONER

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OCTOBER TERM, 1939

No. 243

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

F. W. FITCH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 10–13) is unreported. The opinion of the Circuit Court of Appeals is reported in 103 F. (2d) 702.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 29, 1939 (R. 71). Petition for writ of certiorari was filed July 29, 1939, and was granted October 9, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the payments to the respondent's divorced wife from the income of a trust which was created by him for her maintenance and support and which was ratified in the divorce decree of an Iowa court should be included in the respondent's taxable income.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 26–27.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 10–12) and stipulated by the parties (R. 19–61) are substantially as follows:

The taxpayer, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch, to whom he was married in 1892. They lived together as husband and wife until 1917, and had four children. In that year they separated. In 1919, taxpayer purchased a home for his wife at a cost of $5,000, furnished it for her, and gave her an automobile. In the same year the F. W. Fitch Company was incorporated, and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1,860 were issued to taxpayer and 10 to his wife, who was elected vice president and a director of the corporation; and by reason of taxpayer's control, she received from it $300 a month, although she had no regular hours

of employment and did not devote much time to its affairs (R. 10).

On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against taxpayer in the District Court of Polk County, Iowa. This suit was dismissed, without prejudice (R. 20), on April 7, 1923, after the parties had agreed upon a settlement. In accordance with the settlement, taxpayer leased certain premises, owned by him, to the F. W. Fitch Company for 99 years at an annual rental of $12,000, and on April 23, 1923, joined his wife and the Bankers Trust Company as trustee in the execution of a trust agreement, under which the real estate and the lease thereon were transferred to the trustee to hold title, collect the rents, and after the deduction of expenses to pay to Lettie S. Fitch $600 a month during her life and the remainder to taxpayer during his life. The trust was to continue throughout the joint lives of the taxpayer and his wife and in any event for a period of 15 years. In the event of the death of the taxpayer or his wife prior to the termination of the trust his or her portion of the trust income is to be payable to their children. At the expiration of the trust the corpus is distributable to the children. Upon creation of this trust, the terms of which have been and are now being substantially complied with, the wife ceased to be an officer and director of the F. W. Fitch Company, and received no further payments from it (R. 10–11, 35, 36).

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against taxpayer in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner, and praying for the custody of the child, the only one then a minor, and for a money judgment against taxpayer. In his answer taxpayer alleged *inter alia* that he had created the above-mentioned trust for her benefit in settlement of the prior suit for maintenance; that (R. 11):

> * * * She is now and was receiving this $600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner. * * *

and that (R. 11):

> This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other.

On December 17, 1925, the court entered a decree finding (R. 59)—

> * * * it appearing to the court that the parties * * * have entered into an agreement of settlement of all of their property matters and alimony without the aid of the court, and that the agreement has been per-

> formed and division of the property and provisions for alimony made in accordance therewith; * * * and the court having heard the evidence, and being fully advised in the premises, finds that the plaintiff is entitled to the relief prayed for in her petition as against Fred W. Fitch, and is entitled to an absolute divorce, and is entitled to the property and alimony settlement.

The decree granted the wife an absolute divorce and the custody of the minor son and further provided (R. 11–12):

> * * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Pursuant to this decree taxpayer transferred to Lettie S. Fitch 600 shares of the common stock of the F. W. Fitch Company, which on December 31, 1925, had a book value of $77,959.80 and paid to her attorney the sum of $23,500, of which she received $8,500, the balance representing counsel fees and expenses (R. 12).

During 1933 the trustee under the trust of April 23, 1923, distributed to Lettie S. Fitch $7,128, which the Commissioner included in taxpayer's taxable income (R. 12).

The Board, relying upon *Douglas* v. *Willcuts*, 296 U. S. 1, upheld the Commissioner, and found a

deficiency in tax in the amount of $1,555.58 (R. 13). The Circuit Court of Appeals, one judge dissenting, held *Douglas* v. *Willcuts* distinguishable, and reversed the decision of the Board of Tax Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In excluding from the gross income of the respondent income paid to his divorced wife pursuant to the provisions of a trust established by respondent for her maintenance and support, which trust was ratified and confirmed in a divorce decree.

2. In failing to hold respondent taxable under the doctrine of *Douglas* v. *Willcuts*, 296 U. S. 1, upon the said income, as income paid out to his wife under a trust created by him to discharge his legal obligation to support her.

3. In holding that the considerations that the alimony trust may not, subsequent to the divorce decree, be modified by the state court and that the settlor has not agreed to make up deficiencies in the income render the doctrine of *Douglas* v. *Willcuts* inapplicable.

4. In failing to affirm the decision of the Board of Tax Appeals, and in reversing that decision and remanding the cause.

SUMMARY OF ARGUMENT

The trust was created for the purpose of discharging respondent's subsisting obligation to support his wife. It was ratified by the divorce court

as a means by which he was to discharge that duty after the divorce. The income from the trust is therefore taxable to the respondent, just as though he had received it and then paid it over to his wife. *Douglas* v. *Willcuts*, 296 U. S. 1.

That the divorced wife must look solely to the trust is immaterial. It was the act of the respondent which permanently devoted the trust income to his obligation. The trust itself is in substance equivalent to a continuing exercise by the settlor of the power to direct the application of the income along the predetermined channels.

There is no essential difference between the case at bar and *Douglas* v. *Willcuts*. Although the Minnesota court in *Douglas* v. *Willcuts* had the power to modify the alimony decree thereafter, the fact that such continuing power of modification may be absent in Iowa is inconsequential. In any event, however, the Iowa law does permit the divorce court to alter the alimony decree, so that even this alleged difference between *Douglas* v. *Willcuts* and the instant case vanishes.

ARGUMENT

UNDER THE PRINCIPLES OF DOUGLAS v. WILLCUTS THE INCOME IN QUESTION IS TAXABLE TO THE HUSBAND

1. The trust here involved was executed while a suit for separate maintenance was pending (R. 10–11). The divorce suit was filed two years later (R. 11). While the divorce proceedings were

pending, the taxpayer and his wife agreed upon a property and alimony settlement (R. 59). The agreement provided for the immediate payment of a sum of money, for the transfer of certain securities, and for the continuance of the trust theretofore created. This agreement was approved by the Iowa court (R. 11–12, 59–60), which specifically decreed that the trust agreement "be, and the same is hereby ratified and confirmed * * *" (R. 60).

Thus, the Iowa court accepted the trust as marking out the extent of the husband's duty of support thereafter. In Iowa a judgment for alimony creates no new obligation; it simply determines the extent of the existing obligation and regulates the manner of its performance. *Martin* v. *Martin*, 65 Iowa 255; *McNally* v. *Emmetsburg National Bank*, 197 Iowa 602, 609. Although the spouses may contract with reference to the amount of alimony to be awarded, the local courts nevertheless undertake to scrutinize the agreement very closely, and the contract will not be enforced unless it appears to have been fairly entered into, and to be reasonable, just and fair to the wife. *Martin* v. *Martin*, *supra*. Cf. *Olds* v. *Olds*, 219 Iowa 1395, 1406. And when such a contract is approved by the court it is merged with and becomes a valid part of the divorce decree. *Reppert* v. *Reppert*, 214 Iowa 17, 23; *Belding* v. *Huttenlocher*, 177 Iowa 440, 447–448; *Nicolls* v. *Nicolls*, 211 Iowa 1193, 1200.

The property and alimony settlement in this case was approved by the court after hearing the evidence (R. 59). Accordingly, the trust was intended by the parties to be, and was ratified by the court as the means whereby the husband discharged his obligation to his wife after divorce. Translated into dollars, the obligation was $600 a month, payable out of the income of the trust, and was thus coextensive with the terms of the trust. The income from the trust, when so applied in discharge of the husband's obligation, was therefore taxable to him under the principles of *Douglas* v. *Willcuts*, 296 U. S. 1.

In *Douglas* v. *Willcuts*, a husband, in anticipation of divorce, had created a trust for his wife to pay her $15,000 a year for a fixed period, and $21,-000 a year thereafter. Excess income was to be paid to him, but in the event of any deficiency in income the trustee could call upon him for the difference, and upon his failure to pay the difference the trustee was authorized to make up the deficiency out of corpus. The parties had agreed that these provisions for the wife were "in lieu of, and in full settlement of alimony, and of any and all dower rights or statutory interests in the estate" of her husband, and "in lieu of any and all claims for separate maintenance and allowance for her support." (P. 3.) A divorce decree entered thereafter provided that the provisions in the trust for the wife's benefit were to be in lieu of all alimony

or interest in the property of the husband. In holding the husband taxable with respect to the income of that trust, this Court said (pp. 8–9):

> Petitioner's contention that the district court did not award alimony is not supported by the terms of the decree. It described the provision as made "in lieu of all *other* alimony or interest in the property or estate of the defendant." *However designated, it was a provision for annual payments to serve the purpose of alimony,* that is, to assure to the wife suitable support. The fact that the provision was to be in lieu of any other interest in the husband's property did not affect the essential quality of these payments. Upon the preexisting duty of the husband the decree placed a particular and adequate sanction, and imposed upon petitioner the obligation to devote the income in question, through the medium of the trust, to the use of his divorced wife.
>
> * * * * *
>
> We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. * * * The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered. *Burnet* v. *Wells, supra.* [289 U. S. 670.] * * * [Italics supplied.]

These principles have been applied in an impressive number of cases. *Helvering* v. *Corey,* 297 U. S.

694, reversing *per curiam*, 79 F. (2d) 661 (C. C. A. 3d); *Helvering* v. *Schweitzer*, 296 U. S. 551, reversing *per curiam*, 75 F. (2d) 702 (C. C. A. 7th), rehearing denied, 296 U. S. 665; *Helvering* v. *Stokes*, 296 U. S. 551, reversing *per curiam*, 79 F. (2d) 256 (C. C. A. 3d), rehearing denied, 296 U. S. 665; *Helvering* v. *Blumenthal*, 296 U. S. 552, reversing *per curiam*, 76 F. (2d) 507 (C. C. A. 2d); *Donnelley* v. *Commissioner*, 101 F. (2d) 879 (C. C. A. 7th), certiorari denied, June 5, 1939, No. 938, October Term, 1938; *Glendinning* v. *Commissioner*, 97 F. (2d) 51 (C. C. A. 3d); *Alsop* v. *Commissioner*, 92 F. (2d) 148 (C. C. A. 3d), certiorari denied, 302 U. S. 767, rehearing denied, 303 U. S. 666; *Hill* v. *Commissioner*, 88 F. (2d) 941 (C. C. A. 8th); *Commissioner* v. *Grosvenor*, 85 F. (2d) 2 (C. C. A. 2d); *Metcalf* v. *Commissioner*, 40 B. T. A. 177; *Barbour* v. *Commissioner*, 39 B. T. A. 553; *Weir* v. *Commissioner*, 39 B. T. A. 400; *Knight* v. *Commissioner*, 39 B. T. A. 436; *Dixon* v. *Commissioner*, 39 B. T. A. 527; *Tilles* v. *Commissioner*, 38 B. T. A. 545, 548–549; *Goldring* v. *Commissioner*, 36 B. T. A. 779; *Hogan* v. *Commissioner*, 35 B. T. A. 26; *Whitaker* v. *Commissioner*, 33 B. T. A. 865.

We respectfully submit that the instant case calls for the application of the same principles. The decree of the Iowa court confirms and embodies the husband's obligation to devote the income in question, through the medium of the trust, to the use of his wife. That income stands substantially on the same footing as though he had

received it personally and had been required by the decree to make payment directly to his wife.

Here, as in *Douglas* v. *Willcuts,* the trust income serves as a substitute for payments made directly by the husband, and in every real sense confers upon him a direct benefit which constitutes taxable income to him. As Judge Woodrough said in his note of dissent, the decision of the Board should have been affirmed upon the authority of *Douglas* v. *Willcuts* (R. 71).

The majority of the court below, however, undertook to distinguish *Douglas* v. *Willcuts.* That distinction was simply that the creation of the trust in the *Douglas* case did not itself discharge the husband of his duty of support, since (1) the trustee in the *Douglas* case was given the right to call upon the husband to make up any deficiency in the income of the trust whereas the husband's obligation here was limited to the trust itself, and (2) under Minnesota law, which was applicable in the *Douglas* case, the divorce court could at any time thereafter modify the alimony decree, whereas, under Iowa law, no such power was said to remain in the divorce court.[1] The court below said (R. 69):

> In the Douglas case, the legal liability to his wife continued throughout the tax year because he expressly agreed that if the trust

[1] We will assume *arguendo* in this portion of the argument that the court below correctly interpreted the Iowa law as to the existence of a continuing jurisdiction in the

> income should fall below $15,000.00 in any year, he would make up the deficiency, and the divorce decree confirmed that liability. In addition to this, the law of Minnesota continued his liability for the support of his divorced wife and vested a continuing jurisdiction in the courts to supervise and revise both the decree and the trust agreement to that end. * * *

In making the decision turn upon so thin a distinction, we submit that the court stressed considerations that were not crucial to the result in *Douglas* v. *Willcuts*. It is true that in reciting the facts this Court did state that deficiencies in the trust income were to be made up in a prescribed manner (296 U. S., p. 3). And the Court did refer to the power of the Minnesota court to revise its alimony decree (296 U. S., pp. 6–7), in the course of a general discussion of the state law establishing that the trust operated to discharge legal obligations imposed by a court not bound by the trust provisions. But the Iowa court was likewise not bound to accept the trust as discharging respondent's obligation. *Martin* v. *Martin*, 65 Iowa 255. In adopting the trust, the Iowa court simply ruled in substance that the obligation was coextensive with the terms of the trust, and thus decreed in

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divorce court to modify the alimony decree. However, we believe that the court below was mistaken in its understanding of the Iowa law, and we will urge later, pp. 20–23, that the continuing power to modify the alimony decree does exist in Iowa.

advance the extent of the husband's future liability. The income derived from that trust, therefore, did operate to fulfill the obligation which the state court had marked out. The fact that the Minnesota court could later modify the decree made more striking the application of the principles announced in *Douglas* v. *Willcuts.* But we submit that it was not the pith of the decision.

The Court in *Douglas* v. *Willcuts* likewise commented at some length (296 U. S., p. 8) upon the fact that the Minnesota court—

> did not approve the trust agreement as one deriving efficacy from the action of the parties. The court made its own requirement. The decree required the petitioner to "provide and create the trust fund." While the terms of the trust as set up in the trust agreement were approved, the court made those terms its own. It was from this action of the court that the trust derived its force.

Yet, within three months, in *Helvering* v. *Coxey,* 297 U. S. 694, the Court ruled per curiam that the grantor of an alimony trust was taxable, even though the decree of the state court made no mention whatever of the trust. We believe that the continuing power of the Minnesota court, together with the grantor's contingent liability to make up deficiencies, were no more essential to the decision in *Douglas* v. *Willcuts* than was the fact that the Minnesota court ratified and adopted the trust.

The critical element in *Douglas* v. *Willcuts* was, we submit, that the trust operated to discharge the taxpayer's obligation to his wife, whether or not that obligation could be increased, or whether or not it was fortified by a contingent liability to make up deficiencies. In Iowa, as in Minnesota, the divorce court may mark out the husband's duty of future maintenance, and enter an appropriate order. And where the court determines that the income from a trust established by the husband is adequate provision for such maintenance, the subsequent application of that income carries out that obligation, and should be taxable to the husband.

Moreover, the income from the trust was $12,000 a year, of which only $7,200 was payable to the wife. There was accordingly a comfortable margin of security that her alimony would be paid. For, her $600 a month was to be paid first, and only the remaining income was to be paid to the grantor (R. 38). Thus, the fact that the grantor's remainder income actually did serve as a cushion to guarantee, at least in part, his wife's alimony, is comparable to the continuing contingent obligation of the husband in *Douglas* v. *Willcuts*.

Similarly, by establishing a trust with a sufficiently large amount of principal, the husband in nearly every case could fairly insure his wife a specified annual income without personally assuming responsibility to make up any deficiencies. As a practical matter, the difference between such a situation and *Douglas* v. *Willcuts* would be negli-

gible. Yet the decision below, turning as it does upon a continuing liability to make up a hypothetical deficiency, would require a different result. We believe that this Court could not have intended *Douglas* v. *Willcuts* to be so drastically limited by so attenuated and so meaningless a distinction.

The only difference between this case and *Douglas* v. *Willcuts*, is the *extent* of the obligation rather than the *existence* of the obligation. In both situations the husband had, at the time of the divorce decree, an obligation towards his wife. In both cases, the divorce court marked out the limits of that obligation. In *Douglas* v. *Willcuts*, that obligation involved not only the income from the trust, but also a collateral obligation to make up deficiencies. Here the obligation was limited to the trust itself. But in each case, the income was applied to discharge the obligation decreed by the divorce court. And in both the trusts were merely the predetermined channels for the payment of the income in fulfillment of the duty to support. That he may not be under any additional obligation should not change the essential quality of the income of the trust as thus applied in lieu of alimony.

The decision below represents a departure from the sound principles established by *Douglas* v. *Willcuts*. In considering the precise question here presented, the Board of Tax Appeals has taken the unusual step of refusing to follow the decision of the Circuit Court of Appeals in the instant case.

In *Metcalf* v. *Commissioner,* 40 B. T. A. 177, the Board plainly declared (p. 180):[2]

> *Fitch* v. *Commissioner,* * * * is directly contrary to the result we reach here. * * * Despite our respect for that tribunal, we find ourselves unable to follow the reasoning of the *Fitch* case. * * *

If the decision below is permitted to stand unreversed, its sterile refinements will practically strip *Douglas* v. *Willcuts* of any real significance. And the absurd limits to which those refinements may lead is strikingly revealed in *Helvering* v. *Leonard,* 105 F. (2d) 900 (C. C. A. 2d), now pending upon the Government's petition for certiorari, No. 426, present Term.

In the *Leonard* case, as in the instant case, the husband undertook no personal obligation to guarantee any specified amount of income to the wife. But the trust contained a large amount of bonds, which he guaranteed both as to principal and interest, and in case of default he agreed to substitute cash or securities in lieu thereof. See *Leonard* v. *Commissioner,* 36 B. T. A. 563, 564; and see also record in No. 426, p. 24. Thus, by establishing a trust with sufficient corpus, by undertaking to maintain the corpus at a fixed level, and by agreeing to guarantee a specified return upon the investments of the trust, the husband could achieve

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[2] The Board in the *Metcalf* case also rejected *Commissioner* v. *Tuttle,* 89 F. (2d) 112 (C. C. A. 6th), which was relied upon by the court below in the instant case.

almost the identical result as in *Douglas* v. *Willcuts*, without, however, subjecting himself to tax.[3] We respectfully submit that this Court could not have intended *Douglas* v. *Willcuts* to rest upon so unreal and so metaphysical a foundation.[4]

Moreover, the result reached below and in the *Leonard* case permits the husband to circumvent an express prohibition in the statute and regulations. Section 24 (a) (1), *infra*, provides that no deduction shall be allowed in respect of "Personal, living, or family expenses," and Article 281 of Regulations 77, *infra*, construing the statute, provides that alimony may not be deducted from gross

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[3] Both *Helvering* v. *Leonard* and its companion case, *Fuller* v. *Helvering*, 105 F. (2d) 903 (C. C. A. 2d), pending on petition for certiorari, No. 427, present Term, necessitated the overruling of an earlier Second Circuit decision, *Helvering* v. *Brooks*, 82 F. (2d) 173 (C. C. A. 2d). See also *Commissioner* v. *Hyde*, 82 F. (2d) 174 (C. C. A. 2d).

[4] The lack of any substantial difference between the *Leonard* case and *Douglas* v. *Willcuts* is brought into even sharper relief by the fact that the husband in the *Leonard* case undertook to pay the wife $35,000 a year exclusive of the trust, and this liability was subject to future modification on account of changed circumstances. Obviously, any marked change in the income from the trust would be such a new circumstance, and would undoubtedly be reflected in any subsequent order altering the husband's personal liability.

Thus, by combining the various elements present in the *Leonard* case, the rule of *Douglas* v. *Willcuts* would be rendered practically meaningless simply by invoking the glib formula that he is not taxable where there is no continuing obligation to make up deficiencies in the specified annual amounts to be paid to the wife.

income. Had the grantor held the property without the interposition of the trust, and simply paid out the income therefrom to his wife as alimony he would have been chargeable with the full amount of that income and would not have been entitled to any deduction on account of the alimony paid out. The decision below permits him to achieve the same result by creating a trust, but without rendering him liable for tax with respect to the income. In essence, it awards him the very deduction that Congress has denied him.

Furthermore, the basic issue before the Court is whether the income in question falls within the definition of gross income as set forth in Section 22 (a), *infra*, and the broad sweep of that definition has often been said to be coextensive with the power of Congress under the Constitution. *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 89; *Douglas* v. *Willcuts*, *supra* at 9; *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 93; *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216, 223; *Irwin* v. *Gavit*, 268 U. S. 161, 166. However, it seems clear beyond question that there can be no constitutional objection to the tax here involved. For, in *Burnet* v. *Wells*, 289 U. S. 670, this Court sustained a tax upon the grantor of an irrevocable trust established to pay premiums on policies of insurance taken out on his own life for the benefit of others. No legal obligation of any kind was there involved. At most the trust served to discharge a moral obligation owed by the grantor to his family. Yet it accom-

plished a result which to him was desirable, and which he would otherwise have been compelled to achieve by the use of his own funds or unrestricted income. By employing an irrevocable trust, he had merely devoted a portion of his future income to that end. The Court commented upon the various trust devices employed in order to defeat taxes in which the common element was the surrender of title to another while retaining the substance of enjoyment. And in sustaining the tax, the Court remarked (p. 677):

> At times escape has been blocked by the resources of the judicial process without the aid of legislation. * * * In these and other cases there has been a progressive endeavor by the Congress and the courts to bring about a correspondence between the legal concept of ownership and the economic realities of enjoyment or fruition. * * *

2. Thus far, we have urged that the basis upon which the court below undertook to distinguish *Douglas* v. *Willcuts* is unsound, and we contended that neither the continued power of the state court to modify the decree nor the contingent obligation to make up any hypothetical deficiencies should be pivotal. And for the purpose of argument we assumed that the court below had correctly interpreted the Iowa law as forbidding any subsequent modifications of the alimony decree. However, we believe that the court erred in its interpretation of the Iowa law, and that the power to modify does exist in Iowa.

At the very outset, Section 10481 of the Iowa Code plainly and unambiguously declares:

> *Alimony—custody of children—changes.*— When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.
>
> *Subsequent changes may be made by it in these respects when circumstances render them expedient.* [Italics supplied.]

And the Supreme Court of Iowa has often recognized the existence of the power of modification, either by expressly approving a modification, or by denying the modification sought on the ground that there had not been a showing of sufficient facts to justify the change. *Nicolls* v. *Nicolls*, 211 Iowa 1193; *Handsaker* v. *Handsaker*, 223 Iowa 462; *Boquette* v. *Boquette*, 215 Iowa 990; *Toney* v. *Toney*, 213 Iowa 398; *Morrison* v. *Morrison*, 208 Iowa 1384; *Jasper* v. *Jasper*, 188 Iowa 1247; *Kirk* v. *Kirk*, 222 Iowa 945; *Junger* v. *Junger*, 215 Iowa 636; *Stone* v. *Stone*, 212 Iowa 1344; *McNary* v. *McNary*, 206 Iowa 942; *Goldsberry* v. *Goldsberry*, 217 Iowa 750, 755–758; *Ferguson* v. *Ferguson*, 111 Iowa 158.

The Iowa cases cited by the court below are all distinguishable. Thus in *Spain* v. *Spain*, 177 Iowa 249, the original divorce decree had made no provision whatever for alimony, but the wife later attempted to have the court enter a decree for alimony. The court pointed out that the statute did not give it power to award alimony where none

had been provided in the original decree but it was very careful to state[5] (pp. 257–258, 260):

> It is doubtless true that, where an allowance is made in the original decree for maintenance of the wife, this is subject to change on account of changed conditions. * * *
>
> * * * * *
>
> Had there been a provision for future maintenance, then either might have had a modification thereof upon a change in conditions and some equitable reason given for either enlarging or reducing it. * * *

In *Kraft* v. *Kraft*, 193 Iowa 602, likewise relied upon by the court below (R. 68), provision had been made in the original divorce decree for "permanent" alimony in the form of a lump sum. The wife had obtained two successive modifications of the decree increasing her rights, and was seeking a third increase. The court denied the request upon the ground that there was (p. 606) "no evidence to show that there has been any material change in conditions after the second order * * *." However, it is true that the court did go on to say, in dicta, that modification was not permissible where alimony had been awarded "in a lump sum" or where it consisted of "a division of the real property of the parties" (pp. 607–608). To the extent that this language could in any way be con-

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[5] The distinction upon which *Spain* v. *Spain* turned has been similarly employed in other states. See Schouler, *Marriage, Divorce, Separation and Domestic Relations* (6th Ed.), § 1807

strued as denying the existence of the power of modification generally, it is without doubt contrary to the great weight of the Iowa decisions, and particularly of the more recent Iowa decisions. And even to the extent that it refers merely to lump-sum settlements, it is inconsistent with the ruling in the very case before the court since the court left undisturbed the two prior increases in alimony.

None of the three remaining cases (*Barish* v. *Barish*, 190 Iowa 493; *Carr* v. *Carr*, 185 Iowa 1205; *McCoy* v. *McCoy*, 191 Iowa 973) cited by the court below (R. 68) supports the broad proposition for which they were invoked.

3. Although we believe that the Iowa court retained the power to modify the alimony decree and that this case is therefore not distinguishable from *Douglas* v. *Willcuts* even on this ground, we nevertheless urge the Court not to rest the decision upon that basis. For, not only would a holding on that ground establish an unsound distinction, productive of diversity of tax consequences in substantially identical situations, but every case would require the Treasury to make an extended inquiry into local law to determine from the perplexing maze of state statutes, decisions, and dicta, often oblique and conflicting, whether the particular alimony decree is subject to subsequent modification. And although taxability may, and sometimes should turn upon local law, such dependence exists only where it is clearly called for by the federal act.

The guiding principle has been plainly stated in *Burnet* v. *Harmel*, 287 U. S. 103, 110:

> The exertion of that power [to tax] is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation. * * * State law may control *only* when the federal taxing act, by *express language* or *necessary implication*, makes its own operation dependent upon state law. [Italics supplied.]

See also *Lyeth* v. *Hoey*, 305 U. S. 188, 193; *Heiner* v. *Mellon*, 304 U. S. 271, 279; *Thomas* v. *Perkins*, 301 U. S. 655, 659; *McFeely* v. *Commissioner*, 296 U. S. 102, 107–108; *Palmer* v. *Bender*, 287 U. S. 551, 555–556; *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308, 310–311; *Weiss* v. *Wiener*, 279 U. S. 333, 337; *Burk-Waggoner Assn.* v. *Hopkins*, 269 U. S. 110; *United States* v. *Childs*, 266 U. S. 304, 309. Applying the same principle here, it seems clear that the federal statute does not make state law controlling either by "express language" or "necessary implication."

Statutes granting courts the authority, in varying degrees, to modify alimony decrees have been enacted in at least thirty-two states, the District of Columbia, Alaska, and Hawaii. See 2 Vernier, *American Family Laws* (1932), Sec. 106; *Id.* (1938 Supp.), Sec. 106. Should the lower court be sus-

tained in its ruling that state law is the determinative factor, considerable confusion is likely to result. The present rule, which the Treasury seeks to apply with uniformity throughout the United States, would become varying and uncertain. Ambiguities in local statutes would have to be resolved. Treasury officials would be compelled to guess whether language in an opinion of a state supreme court directed at one type of alimony decree would be applied by the same court in the case of a different type of alimony decree. And difficulties in prognostication will be emphasized by the conflicting inferences that may often be drawn from loosely written opinions of some of the state courts.

We believe that such result would be unwise both practically and administratively, and respectfully submit that the power of the state court to modify the decree should not be held to be a pivotal factor in this case.

CONCLUSION

The decision below should be reversed.

ROBERT H. JACKSON,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
ARNOLD RAUM,
Special Assistants to the Attorney General.

NOVEMBER 1939.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid; or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 83. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. An amount of principal paid under a marriage

settlement is a gift. Neither alimony nor an allowance based on a separation agreement is taxable income. (See article 281.)

ART. 281. *Personal and family expenses.*— * * * Alimony and an allowance paid under a separation agreement are not deductible from gross income. * * *

Code of Iowa, 1935:

SEC. 10481. *Alimony—custody of children—changes.*—When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.

Subsequent changes may be made by it in these respects when circumstances render them expedient. [C51, Sec. 1485; R60, Sec. 2537; C73, Sec. 2229; C97, Sec. 3180; C24, 27, 31, Sec. 10481.]

(The above provisions were part of the Iowa law at the time the divorce was granted in this case in 1925 and have remained the same since that time.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

No. 243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

F. W. FITCH.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JOHN B. CLAYTON STIVER,
Counsel for Respondent.

ARNOLD F. SCHAETZLE,
Of Counsel.

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CITATIONS.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The memorandum opinion of the Board of Tax Appeals is not reported. (R. 10-13). The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 103 F. (2d) 702.

Jurisdiction.

The jurisdiction of this Court has been invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938) (28 U. S. C. A. #347). The judgment of the Circuit Court of Appeals was entered April 29, 1939.

Question Presented.

Whether this Court's decision in *Douglas v. Willcuts*, 296 U. S. 1, requires the taxation to the respondent of the income of an irrevocable trust which he established for the benefit of his former wife, although the respondent was not under any obligation to her which continued into the tax year and which was satisfied *pro tanto* by the distribution of trust income to her.

Statutes Involved.

The applicable statutes are set out in the Appendix, *infra*, pp. 9, 10, 11.

ARGUMENT.

I.

Douglas v. Willcuts, 296 U. S. 1, is not applicable.

In holding that the grantor of an irrevocable trust was taxable upon the income paid to his former wife, this Court, in *Douglas v. Willcuts*, 296 U. S. 1, pointed out that the taxpayer was under a legal obligation to his former wife in the tax year in question and that the income of the trust was used to satisfy that obligation. The opinion of this Court shows that the obligation of the taxpayer arose out of (1) his voluntary agreement to see that his former wife received a fixed amount per annum; (2) the provisions of the divorce decree which actually directed him to pay the fixed amount to his former wife; and (3) the general law of Minnesota under which the court granting the divorce retains the power to revise both the decree and the agreement between the taxpayer and his former wife.

In so holding, the Court recognized an exception to the statutory scheme relating to the taxation of trust income

which provides that the distributable income shall be taxed to the distributee. and accumulated income shall be taxed to the trust. Sections 161 and 162 Rev. Act 1932, *infra* p. 10. The exception thus recognized is sound because otherwise a debtor could evade income taxes by the device of creating trusts with directions to apply the income to pay his obligations. The fact that the obligation is one for alimony or support is not crucial. The principle is the same whatever may have been the origin or nature of the obligation. The fundamental question is whether there is a continuing obligation of the taxpayer to which the trust income is being applied.

Where the grantor does not assume a continuing obligation to his former wife and where his liability to her for support and maintenance is extinguished upon the creation of a trust so that neither by contract nor the applicable state law is there, or can there be, any further obligation on him, the reason for the Court made exception to the statutory scheme fails. The mere fact that the trust grantor was originally under some obligation to the beneficiary, which obligation was extinguished once and for all by the creation of the trust, is not ground for attributing the subsequent income of the trust to the grantor. In such case the grantor derives no benefit from the trust income which concerns him no more than the subsequently accruing income of property transferred absolutely in payment of a debt concerns its former owner. Thus, a distinction must be made between the case in which the grantor's liability to his former wife is extinguished upon the creation of the trust and the case in which the grantor's continuing obligation is satisfied from time to time by the application of the trust income.

Douglas v. Willcuts, supra, has no application to a case where all obligation of the grantor to his former wife is extinguished by the creation of a trust and neither by local law nor by contract is there any obligation on the grantor

to supplement the trust income or any power in the courts to revise the arrangement. In such case the income is that of the beneficiary taxable to her, at least where, as in this case, the trust is irrevocable and the grantor has retained no reversionary interest in the trust estate. The situation is the same as if a lump sum had been paid to extinguish finally the obligation to support. As this Court said of the analogous situation in *Helvering v. Butterworth*, 290 U. S. 365, the grantor's former wife has seen fit to exchange her marital rights for the position of a true trust income beneficiary and there is no reason why she should not be treated as such for tax purposes.

II.

The Second, Sixth and Eighth Circuit Courts of Appeal agree that if the taxpayer is not under a legal liability to his former wife in the tax year in question the income of an irrevocable trust created by him is not taxable to him and there are no Court decisions to the contrary.

The Sixth Circuit Court of Appeals in *Commissioner v. Tuttle*, 89 F. (2d) 112, and the Second Circuit Court of Appeals in *Helvering v. Leonard*, ... Fed. (2d) ..., and *Fuller v. Helvering*, ... Fed. (2d) ...[1], have considered the precise question involved here and decided the question unanimously in accord with the decision of the Eighth Circuit Court of Appeals in the instant case. Indeed, the petitioner does not assert any conflict, but attempts to show that there is some confusion and uncertainty in the cases.

As a matter of fact, the decided cases are all in accord with the principles stated above. The only confusion appears to exist in the Department of Justice which after successfully opposing *certiorari* in *Alsop v. Helvering*, 302 U. S.

[1] These cases decided by Second Circuit Court of Appeals on June 30, 1939, not yet reported at time of printing this brief. Same are set out in full in appendix B commencing page 18 of the petition herein.

767, and *Donnelley v. Helvering*, 101 F. (2d) 879, cert. den. June 5, 1939, on the ground that the decisions in *Commissioner v. Tuttle*, 89 F. (2d) 112, and the instant case were distinguishable because the trust grantors were not under any continuing obligation to the beneficiaries which was satisfied by the application thereto of the trust income, now asserts that those decisions are wrong and that no such distinction should be recognized.[2] (See Brief in Opposition in *Alsop* case, p. 9;)

In every case in which the trust grantor has been held taxable on trust income on the authority of *Douglas v. Willcuts*, it has appeared that he was under a continuing legal obligation which was satisfied *pro tanto* by the application of the trust income in the particular tax year involved. In *Helvering v. Lucy Blumenthal*, 296 U. S. 552, the grantor remained personally liable for the bank loan to the satisfaction of which the trust income was to be devoted. In *Helvering v. Schweitzer*, 296 U. S. 551, and *Helvering v. Stokes*, 296 U. S. 551; the grantor remained legally liable for the support of the minor children despite the creation of the trust. In *Commissioner v. Hyde*, 82 F. (2d) 174; *Glendinning v. Commissioner*, 97 F. (2d) 51; *Alsop v. Commissioner*, 92 F. (2d) 148, cert. den. 302 U. S. 767, and *Donnelley v. Helvering*, *supra*, the grantors remained liable by force of their express agreements to make up deficiencies in trust income, so that their former wives would receive a fixed amount in each year. In *Helvering v. Coxey*, 297 U. S. 694, the grantor re-

[2] At page 4 of the Government's Brief in opposition to certiorari in the *Donnelley* case it was stated:

"*Blair v. Commissioner*, 300 U. S. 5, *Commissioner v. Tuttle*, 89 F. (2d) 112 (C. C. A. 6th), and *Fitch v. Commissioner*, 1939, Prentice-Hall Federal Tax Service, vol. 1, par. 5,398, decided April 25, 1939 (C. C. A. 8th), are all distinguishable from the present case on the ground that the application of the income in question in those cases arose from an outright transfer of property or income, with no obligation to maintain future payments of income, and thus was not in discharge of a continuing obligation of the taxpayer, as in the present case. See *Alsop v. Commissioner*, *supra*, where a conflict with the *Tuttle* case, *supra*, was asserted in the petition for certiorari."

mained liable, as was pointed out in the Government's petition for certiorari (p. 6), under the law of New Jersey, which imposed on him an obligation to support his wife even after divorce and despite the assignment which he had made for her benefit.

The petitioner attempts to dismiss as a mere technicality, without significance, the circumstance that every case considering this question has turned one way or the other, depending upon whether or not the trust grantor's liability continued into the tax year involved. However, this distinction has been fully considered by the courts, and every court considering the question has followed it. These cases establish the fact that the fundamental question is whether there is a continuing obligation of the grantor. after the trust is created, so that the trust income continues to be constructively the grantor's, used from time to time to pay his obligations.

III.

The Respondent was not under any liability to his former wife in the tax year involved.

The respondent in the instant case did not agree to pay his former wife a fixed amount each year, but merely agreed to create a trust for her benefit and to transfer certain property to her. Upon the creation of the trust and the transfer of the property referred to in the agreement, the petitioner's obligation under the agreement was completely discharged. The decree granting the petitioner's former wife an absolute divorce did not impose any obligation on him to pay her alimony or any amount in lieu thereof, but merely ratified and confirmed the agreement and the property and alimony settlement made by the taxpayer and his former wife. Thus the obligation imposed on the petitioner by the decree was extinguished by the cre-

ation of the trust and the transfer of the property referred to in the agreement.

Nor was there any obligation upon the petitioner, under the law of Iowa, to support his former wife after the final decree of divorce was entered. The law of Iowa is well settled that after a final decree of divorce which contains no provision as to alimony, or which is coupled with a lump sum settlement between the parties, there is no obligation on the husband to support his former wife. This proposition was recognized by the court below and is supported by the cases cited in the opinion. *Kraft v. Kraft,* 193 Iowa 602, 187 N. W. 449; *Spain v. Spain,* 177 Iowa 249, 158 N. W. 529; *Carr v. Carr,* 185 Iowa 1205, 171 N. W. 785; *Barish v. Barish,* 190 Iowa 1493, 180 N. W. 724; *McCoy v. McCoy,* 191 Iowa 973, 183 N. W. 377. The cases referred to in the footnote on page 10 of the petition herein follow the decisions in the above mentioned cases and are further authority in support of the proposition that the respondent was under no liability to his former wife after the entry of the final decree of divorce. In *McNary v. McNary,* 206 Iowa 942, and *Goldsberry v. Goldsberry,* 217 Iowa 750, the court held that a final decree of divorce would not be reopened and modified. *Handsaker v. Handsaker,* 223 Iowa 462, merely holds that a final decree of divorce can be modified where the court granting a divorce specifically retains jurisdiction in the decree. It is clear therefore, as held by the Eighth Circuit Court of Appeals in the instant case, that the respondent was under no legal obligation to his former wife in the tax year involved.

Respondent had not voluntarily obligated himself to pay his former wife a fixed amount per year; the decree of divorce imposed no obligation on him to pay her fixed amounts as alimony or in lieu of alimony; and the court granting the divorce had no power after the entry of the decree of divorce by supplemental decree or otherwise to order him to pay any amount to her. Hence, since all of respondent's

obligation to his former wife had ceased prior to the tax year involved, *Douglas v. Willcuts, supra,* can have no application.

CONCLUSION.

THE DECISION OF THE COURT BELOW WAS CORRECT. THERE IS NO CONFLICT OF DECISIONS AND HENCE THE PETITION SHOULD BE DENIED.

Respectfully submitted,

JOHN B. CLAYTON STIVER,
Counsel for Petitioner.

APPENDIX.

Provisions of Revenue Act of 1932 Governing the Taxation of Trust Income.

SEC. 161. IMPOSITION OF TAX.

(a) APPLICATION OF TAX.—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) COMPUTATION AND PAYMENT.—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 142.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(n) any part of the gross income, without limitation, which pursuant to the terms of the will or deed cre-

ating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

SEC. 166. REVOCABLE TRUSTS.

Where at any time during the taxable year the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23(n), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question".

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 243.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

—against—

F. W. FITCH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

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Of Counsel.

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 10) is not reported.

The opinion of the Circuit Court of Appeals (R. 66) is reported in 103 F. (2d) 702.

Jurisdiction.

The decree of the Circuit Court of Appeals (R. 71) was entered April 29, 1939.

Petition for certiorari was filed July 29, 1939, and granted October 9, 1939.

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

(a) A question is whether payments made to respondent's divorced wife from the income of an irrevocable trust created by him on separation and taken into consideration upon a final settlement of all financial obligations to her made later when a divorce took place, should be included in his taxable income, where, after the divorce, there was no continuing obligation on him to support his former wife, and neither by contract nor the law of the state of domicile was there any obligation on him to make good or supplement the trust income, or any power in the courts to revise the property settlement because of changed conditions. Stated in another way, the question is whether, under the conditions stated, the trust income paid to the divorced wife is distributed for the benefit of the divorced husband, and is constructively his.

(b) The question also arises as to what the Iowa law is, and whether under it there was, after the divorce, a continuing obligation on the respondent to support his divorced wife.

Statutes Involved.

Sections 161, 162, 166 and 167 of the Revenue Act of 1932 (c. 209, 47 Stat. 169), relating to the income of trusts, are set forth in the Appendix to this brief (p. 35).

Statement.

This case involves the respondent's Federal income tax for 1933, and the propriety of the action of the

Commissioner of Internal Revenue in requiring respondent to include in his taxable income the amount received in 1933 by his divorced wife out of the income of an irrevocable trust created by him for her benefit on separation prior to divorce, and taken into consideration when making a final property settlement at the time of the divorce.

The facts were stipulated (R. 19-61).

The respondent was married in 1892. In 1917 he and his wife, Lettie S. Fitch, separated and thereafter lived apart (R. 19). In 1919 he purchased a home for his wife at a cost of about $5,000, and furnished it (R. 19). In December, 1922, the wife brought suit in Iowa for separate maintenance (R. 19). As a result of negotiations respondent then created a trust for her benefit (R. 20). Under the trust agreement, dated April 23, 1923 (R. 35), he conveyed to the trustee a factory building and land, which had previously been leased for ninety-nine years to the F. W. Fitch Co., a corporation, at an annual rental of $12,000 (R. 25). He also transferred to the trustee the lease, with right to collect the rents (R. 35).

The trust deed provided that of the income from the trust estate the wife should receive $600 per month so long as she lived. The net income above $600 per month was to be paid to the respondent as long as he lived. On the death of either respondent or his wife, the deceased's share of the income was to be paid to their children. On the death of both, and after the expiration of fifteen years, the principal was to be paid over to the children (R. 35).

The trust was irrevocable. The husband reserved no interest in either the principal or income of the trust estate, except the income in excess of $7,200 per

year for his life. He did not agree to make good any deficiency in the income of the trust, nor obligate himself in any other way to assure her $600 per month (R. 35). As a result of this settlement, the suit for separate maintenance was dismissed without prejudice (R. 20).

The terms of the trust agreement have been complied with by all parties concerned (R. 26).

In April, 1925, the wife filed suit in an Iowa court for divorce and for a share of her husband's estate, and in December, 1925, a decree of absolute divorce was entered (R. 59). The property affairs of the parties were settled by agreement. Consideration was given to the provision theretofore made by the respondent for his wife, including the trust, and he agreed to supplement that by transferring to his wife shares of stock of the book value of $77,959.80, and to pay to her in cash the sum of $23,500, of which $15,000 was to cover her legal and other expenses, and $8,500 was to be retained by her (R. 20, 59).

This arrangement was intended as a final and absolute settlement of all claims for dower, alimony or maintenance. The property settlement was submitted to the court and its decree states (R. 59, 60):

> "It appearing to the court that the parties, Lettie S. Fitch and Fred W. Fitch, have entered into an agreement of settlement of all of their property matters and alimony without the aid of the court, and that the agreement has been performed and division of the property and provisions for alimony made in accordance therewith; * * * the court * * * finds that the plaintiff * * * is entitled to an absolute divorce, and is entitled to the property and alimony settlement.
>
> It is, Therefore, Ordered, Adjudged and De-

creed, that the plaintiff, Lettie S. Fitch, be, and she is hereby, divorced from the defendant, Fred W. Fitch, absolutely; * * * that the trust agreement * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court."

The domicile of the parties has at all times been in the State of Iowa (R. 19).

The court by its decree thus confirmed "a settlement of all their property matters and alimony" (R. 59) which discharged the husband from all liability to his wife.

In 1933 the trustee paid out of the income of the trust estate, in accordance with the terms of the trust agreement, to Lettie S. Fitch $7,128 (being $7,200 less the commissions of the trustee), and to the respondent $4,752 (R. 21). In his return for that year he included as taxable income the $4,752, which he had received, but not the amount paid to his former wife (R. 21).

The Commissioner determined that he should have included as his income the amount paid by the trustee to his former wife, and charged him with a deficiency of $1,555.58 (R. 6, 10).

The Board of Tax Appeals affirmed the action of the Commissioner (R. 13).

The Circuit Court of Appeals reversed, holding that the income of the trust paid to the divorced wife was not chargeable to him; that neither by agreement nor by Iowa law was there any obligation on respondent, continuing after the divorce, to support his former wife, and therefore the trust income paid to the divorced wife was not paid for the benefit of

the respondent, and the payment of income did not operate to relieve him from or satisfy any obligation to which he was then subject; that the settlement and transfers made before and at the time of the divorce, not the subsequent payment of trust income, extinguished any obligation on his part.

Summary of Argument.

I. There was no continuing obligation on the divorced husband to support his former wife.

When the divorce was granted, by agreement confirmed by court decree the husband was finally discharged from liability. The income thereafter earned by the trust and paid to the divorced wife did not reduce or relieve him from any existing liability, nor benefit him in any way. It was not constructively his.

II. In *Douglas* v. *Willcuts*, 296 U. S. 1, the divorced husband bound himself by agreement to secure to his divorced wife a stated income for her life. The trust was merely security for this obligation. Under local law the courts also had continuing power to revise the settlement. Because of these conditions the Court held that the trust income, applied annually to relieve the husband from a continuing liability, was used for his benefit, and constructively his. The principle applies to any case where the grantor creates a trust, the income of which is to be applied to discharge his obligations. The other decisions of this Court follow the same principle.

The decisions of the Circuit Courts of Appeals are in line with this view. The courts of the Second, Sixth and Eighth Circuits have adopted these prin-

ciples and so interpreted *Douglas* v. *Willcuts*. There is no decision to the contrary in any other circuit.

The Board of Tax Appeals has wobbled some, but the majority of its decisions are in accord with these principles.

III. Neither by contract nor local law was there any continuing liability on the husband for the wife's support after the settlement and divorce. The husband did not guarantee the amount of the wife's income, or agree to make up deficiencies, nor did he reserve any interest or reversion in the corpus. The property settlement was final. The divorce court accepted it and confirmed it as such and under the decisions of the Supreme Court of Iowa, the decree constituted a final adjudication of all property and marital rights and obligations between the parties and no court could thereafter modify or revive it.

There is no law in Iowa prohibiting divorced husband and wife from binding themselves by a property settlement, nor any law or decision which would give a divorce court power to later revise a settlement agreed on and confirmed as final. Furthermore, the decree confirming what amounted to a final discharge of liability, even if it had not conformed to Iowa law would have been at most erroneous, not void, and binds the parties, and the Government, on the point that liability was then terminated.

Argument.

I.

There being no continuing obligation on the divorced husband to support his former wife, the income of the trust was not paid for his benefit, and was not taxable to him.

The Revenue Acts expressly provide a plan for the taxation of the income of trust estates. The provisions of the ~~Revenue Act of~~ 1932, here controlling, governing the taxation of trust income (this Brief, pp. 35-38) establish the general rule that income accumulated by the trustee shall be taxable to the trust as an entity, and income distributed shall be taxed to the person to whom distributed. There are statutory exceptions, not here material, as in Section 166 of the 1932 Act, that the income of a revocable trust shall be taxed to the grantor, and as in Section 167 that income accumulated for the grantor shall be taxed to him.

There is no provision of the Act of 1932, or in any other Revenue Act, specifically dealing with so-called "alimony trusts".

Douglas v. *Willcuts*, 296 U. S. 1, dealt with such a case. In that case the liability of the divorced husband was not extinguished by the divorce, or by the creation of the trust. His continuing liability rested on three grounds:

(1) His express agreement that if the trust income should fall below $15,000 in any year, he would make up the deficiency.

(2) The provision of the divorce decree which confirmed that liability; and

(3) The law of Minnesota which continued his liability for the support of his divorced wife, and gave the courts power to revise the decree and trust agreement to that end.

The trust agreement also provided that the trust estate should revert to him on the wife's death. The trust was in substance merely security for his continuing obligation to provide her with an annual income of $15,000.

The principle there established was that if there is a continuing obligation of the trust grantor to the divorced wife and the trust income is used from time to time to satisfy *pro tanto* that obligation, the income is constructively the grantor's. The principle is sound because otherwise one could evade income taxes by the device of creating trusts with direction to apply the income to pay his obligations.

The opinion in *Douglas* v. *Willcuts* is clear. It merely applied the general doctrine of constructive receipt. See *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; *United States* v. *Boston & Maine Railroad*, 279 U. S. 732; *Lucas* v. *Earl*, 281 U. S. 111. The principle it announced is not confined to trusts established to satisfy obligations arising from domestic relations. It applies to any case where the grantor has continuing obligations, and establishes a trust, the income of which is to be applied to their discharge. It is immaterial whether the continuing obligation is to support a divorced wife, or is a debt owing to a bank.

The essential inquiry is whether there is any existing and continuing obligation of the grantor to which

the income is applied. A continuing obligation on a divorced husband to provide for his former wife may result from a decree for periodic payments of alimony, or from contract, such as an agreement by which he remains liable to provide her income in a stated amount, or from statutes of the domicile, as in states where there are laws which expressly provide that a man remains liable for the support of his wife even after divorce, and that all contracts for support and property settlement between divorcees shall be subject to revision if conditions change, and that divorce courts have power later to revise any decree made at the time of divorce, so as to require the husband to support his former wife adequately.

The mistake of the Bureau of Internal Revenue in this case is in failing to recognize this fundamental principle, and in assuming that the income of any trust created on divorce by the husband for the wife is taxable to him merely because the trust was created in settlement of liability for alimony or support.

In this case the Commissioner said:

> "You are advised that the Bureau holds that income from a trust created in lieu of alimony is taxable to the husband, the grantor, for the reason that *the income of the trust* was used for the discharge of the grantor's personal and marital obligations" (R. 7). (Italics ours.)

The fallacy is in the statement that the *income* was used to satisfy an obligation of the respondent. There was no obligation on the grantor when the income was earned or distributed. The payment of income to the wife did not discharge any obligation of his or operate to his benefit. It was legally and financially a matter of indifference to him whether

there was any trust income for the divorced wife. All obligation on his part was terminated at the time of the divorce. Even if the trust had been created at the time of divorce and as part of the settlement, it would have been *the creation* of the trust and the transfer of the capital fund to the trustee which would have extinguished the liability, not the subsequent distribution of the income.

One peculiarity of this case is that the trust was not created at the time of the divorce in settlement of alimony. It was created in 1923 and was irrevocable, and was merely taken into consideration in 1925 in determining what provision should then be made for the wife. It was actually the payment of the lump sum and transfer of shares of stock in 1925 which was the consideration for the agreement, confirmed by decree, which the court below described as having discharged forever all liability of the husband to provide for the wife (R. 59). But even where a trust is created to settle obligations to the divorced wife, if there is no continuing liability, the subsequent income is no more used for the husband's benefit or taxable to him, than is the income derived by the wife from money or property transferred to her absolutely in settlement of her claims.

The mere circumstance that the provision which a man has made for his wife through the creation of a trust was subsequently confirmed in a decree of the divorce court, and therefore can be called alimony, is not controlling. If the decree has subjected him to some obligation, the question remains as to the nature of that obligation and whether it was satisfied by the creation of the trust or has remained as a continuing obligation to be discharged by the periodic

distribution of trust income. Alimony, or provision in lieu of alimony, may be decreed in a lump sum, or may consist of an irrevocable life estate in a trust fund. If so, the life estate is the capital sum transferred to the wife in satisfaction of her marital rights; she becomes the owner of such estate, the income of which is her income. She is not merely an assignee of future income of the husband to be derived from his property. *Cf. Helvering* v. *Butterworth*, 290 U. S. 365; *Helvering* v. *Pardee*, 290 U. S. 365, *loc. cit.* 370; *Blair* v. *Commissioner*, 300 U. S. 5. Those cases are consistent with and support our contention here.

There is no more reason to tax the respondent on the income of this trust, than to tax him on the income the divorced wife may obtain from the shares of stock and cash transferred to her in settlement of her claims.

The Government urges the adoption of some new theory for the taxation of the trust income to the respondent, even in the absence of a continuing legal obligation, and relies on *Burnet* v. *Wells*, 289 U. S. 670. In that case this Court upheld, over a strong dissent, the constitutionality of a special provision of the statute expressly taxing a trust grantor on trust income used to pay premiums on policies of insurance on his life. There is no express provision of the statute relating to taxation of so-called alimony trusts. The Government is here asking this Court, not to uphold the statutory scheme for the taxation of trust income, but to create an exception to it.

II.

The decisions of the courts support the respondent's position.

(a) Decisions of this Court.

Douglas v. *Willcuts*, 296 U. S. 1, referred to above, is the leading case. The principle it announced is clear. In that case the liability of the husband was not ended by the divorce or by the creation of the trust. The husband agreed that if the trust income fell below $15,000 in any year, he would make good the deficiency, and by the law of Minnesota any settlement made at the time of divorce was subject to revision. The trust deed in that case provided that on the wife's death the trust estate should be returned to the husband. In substance, there was a promise by the husband to pay or cause to be paid to the wife $15,000 per year so long as she lived. The trust merely created a fund to secure that obligation, and upon the accomplishment of that purpose the fund was to be returned intact to the husband. *Cf. DuPont* v. *Commissioner*, 289 U. S. 685. Each year as the income of the trust was paid to the wife, the payment operated to relieve the husband from liability *pro tanto* and thus operated to his financial and legal benefit. The Court, referring to the statutory provisions for payment of the tax by the recipient of the income, said (p. 10):

> "These provisions have appropriate reference to cases where the income of the trust is no longer to be regarded as that of the settlor, and we find no warrant for a construction which would pro-

clude the laying of the tax against the one who through the discharge of his obligation enjoys the benefit of the income as though he had personally received it."

In *Helvering* v. *Stokes*, 296 U. S. 551, the Court held for the Commissioner and reversed, *per curiam*, on the authority of *Douglas* v. *Willcuts*. There the taxpayer had created a trust, the income to be paid to his minor children, and the legal obligation to support them continued, and the annual application of the income to their use relieved him of his obligation. (See 79 F. (2d) 256.)

In *Helvering* v. *Schweitzer*, 296 U. S. 551, decided *per curiam* for the Commissioner on the authority of *Douglas* v. *Willcuts*, a father had created a trust, the income to be paid to him to be used for the support of his minor children. Obviously, his liability for support was a continuing one, and each application of the income relieved him *pro tanto* from his obligation. (See 75 F. (2d) 702.)

In *Helvering* v. *Lucy Blumenthal*, 296 U. S. 552, decided for the Commissioner *per curiam*, a woman created a trust, the income of which was required to be and was applied to pay the amount owing on a note she had given her bank and on which she remained liable. (See 76 F. (2d) 507.)

In *Helvering* v. *Coxey*, 297 U. S. 694, decided for the Commissioner *per curiam* on the authority of *Douglas* v. *Willcuts* and the three other cases last above cited, the husband, being entitled to the income of a trust, assigned out of that income $8,400 per

she agreed to make no further demands for support for herself or their two minor children. Afterwards a divorce was granted by a decree, which made no provision for alimony. The agreement provided that as each child attained the age of twenty-three years the wife would assign to it $3,000 per year of the income. The husband was held liable for the tax on income paid to the wife during the minority of the children. The income was intended in large part for the support of minor children, for which there was a continuing liability on him, until they attained majority, and, as the Government's petition for *certiorari* (p. 6) pointed out, the law of New Jersey (the domicile) left on him an obligation to support his wife after divorce and despite the agreement. The assigned income paid the wife from time to time thus operated to satisfy his continuing liability to support his divorced wife and minor children.

These cases are consistent with our position. We know of no other decisions of this Court since *Douglas* v. *Willcuts* bearing directly on the subject.

(b) Decisions of Circuit Courts of Appeals.

In the Circuit Courts of Appeals the subject has frequently arisen.

Three of the Circuits now definitely agree with our position, the Sixth Circuit in *Commissioner* v. *Tuttle*, 89 F. (2d) 112, the Eighth Circuit in this case, and the Second Circuit in *Harry Blumenthal* v. *Commissioner*, 91 F. (2d) 1009 (a *per curiam* affirmance of the Board of Tax Appeals), and in *Leonard* v. *Helvering*, 105 F. (2d) 900, and *Fuller* v. *Helvering*, 105 F. (2d) 903, both decided June 30, 1939.

In the *Tuttle* case the husband had not assumed any continuing obligation to the divorced wife in the trust deed or otherwise, the divorce decree had not imposed any such obligation, and under the law of the domicile the courts had no power to revise the settlement or impose any further burden on the husband. The court held that the income of the trust was not taxable to the husband, distinguishing *Douglas v. Willcuts*, because it dealt with a case of continuing liability and involved a situation where the trust income was applied for the benefit of the grantor.

In the *Harry Blumenthal* case, the underlying principle of the *Tuttle* case was followed by the Second Circuit. The Board of Tax Appeals had held that a divorced husband was not taxable on the income of a trust distributed to his divorced wife after her remarriage, where it appeared that he had not, by contract or otherwise, assumed any obligation to guarantee the income of the trust or otherwise assure her of a stated income. The Circuit Court of Appeals affirmed the Board in a *per curiam* decision.

The *Leonard* and *Fuller* cases, just decided in the Second Circuit, follow the decisions in the Sixth and Eighth Circuits, and adopt the principle that if a liability of the husband for the wife's support does not continue after the trust is made, the trust income is not constructively his.

In an earlier decision, in *Helvering v. Brooks*, 82 F. (2d) 173, the Second Circuit held the husband taxable on the trust income. There the trust deed provided for payment of annual income of $12,000

to the divorced wife, and although the husband did not contract to make good any deficiency, under the law of the domicile (Florida) he remained liable for the adequate support of his divorced wife, and the Florida courts had jurisdiction to revise the arrangement by supplementary decree on the application of either party. This feature of the *Brooks* case was stressed in the Government's brief.[1] That brief stated that the trust was merely collateral security to the husband's obligation for support. Moreover, in the *Brooks* case the trust income was distributable to the grantor after the wife's death and the corpus of the trust was to revert to the grantor's estate on death of both husband and wife.

This situation justified the decision in the *Brooks* case, although the Court of the Second Circuit states in the *Leonard* decision that it did not base the decision on the principle it finally adopted in the *Leonard* and *Fuller* cases.

There is no decision of any Circuit Court of Appeals against our view of the law. Although in a number of cases in other circuits it has been held that the income of a trust created for the benefit of a divorced wife was taxable to her former husband, none of the decisions is in conflict with the rule recognized in the Second, Sixth and Eighth Circuits. All the decisions in all Circuits seem to agree in principle that if after the divorce neither contract

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[1] At page 8 of the Government's brief in that case it was stated:

> "The husband's obligation to support his wife is a continuing obligation and the amounts to be paid to the wife under any agreement or decree may be increased or decreased from time to time as justice and equity may require. General Laws of Florida (1935), C. 16780."

nor local law leaves the husband subject to a continuing liability for his former wife's support during the tax year, the income of an irrevocable trust he has established for her is not constructively his, is not applied for his benefit and, therefore, is not taxable to him.

Decisions in the Third and Seventh Circuits, in which the divorced husband was held taxable on the trust income, were explained by the Department of Justice, in successfully opposing certiorari, as resting on the continuing legal obligation of the trust grantor to his wife during the tax year, and cases in which no such continuing liability existed were expressly distinguished.

Thus, in *Alsop* v. *Commissioner*, 92 F. (2d) 148, certiorari denied 302 U. S. 767, in the Third Circuit; the grantor remained liable to his divorced wife during the tax year by reason of his express agreement to make up deficiencies in the trust income so as to assure her a stated income. The Court of Appeals held that the divorced husband was taxable on the income, and he applied for certiorari. That Government counsel were then disposed to accept the *Tuttle* decision as sound is indicated by their brief in opposition to certiorari, where it is said (p. 9):

> "Petitioner relies on *Commissioner* v. *Tuttle*, 89 F. (2d) 112 (C. C. A. 6th), as creating a conflict with the decision of the court below in the instant case (Pet. 5, Br. 10-11). That case however is clearly distinguishable. The court there stated (p. 113) that the problem presented 'a somewhat different aspect from [that] considered in the *Douglas* case and required 'consideration of local law not controlling in that

case. Moreover, the court there pointed out that under Michigan law the settlement did not constitute alimony but was analogous to a lump sum property settlement; that the decree adjudged that the settlement agreement was 'in full satisfaction and settlement of any and all dower or dower rights and nothing more' (p. 115); and that, under the absolute transfer, there remained no continuing obligation on the part of the taxpayer for support and maintenance or debt to be paid out of his income, either actually or constructively. The court stresses the fact (pp. 115-116) that deficiencies in the annual income to the wife from the trust were not to be made up by the taxpayer, and any excess over the required annual payments to her was not to be paid to him. These distinctions serve to negative the contention that a conflict exists. Moreover, it has not been shown herein that the law governing the present agreement operates to effect a different result from that in the *Douglas* case, as the Michigan law was deemed to do in the *Tuttle* case."

In *Donnelley* v. *Commissioner*, 101 F. (2d) 879, certiorari denied, 59 S. Ct. 1043, in the Seventh Circuit, the divorced husband had assigned to his former wife $30,000 per annum out of the income of a trust created by another for his benefit, and had agreed that if in any year the trust income so assigned to her should fall below $30,000 he would make up the deficiency. The Seventh Circuit, affirming the Board of Tax Appeals, held that the trust income was used to discharge his obligations to his former wife and that such income was, therefore, taxable to him. In opposing the petition for certiorari in that case, Gov-

the *Tuttle* case "on the ground that the application of the income in question in those cases arose from an outright transfer of property or income, with no obligation to maintain future payments of income, and thus was not in discharge of a continuing obligation of the taxpayer as in the present case."

In all other cases in which the divorced husband has been held taxable, it has appeared that he was under an existing legal obligation to his former wife during the tax year, which obligation was discharged *pro tanto* by the trust income distributed to her during that year.

In *Commissioner* v. *Hyde*, 82 F. (2d) 174 (C. C. A. 2) and *Glendinning* v. *Commissioner*, 97 F. (2d) 51 (C. C. A. 3), the grantors remained under a continuing liability because of their express agreements to make up deficiencies in the trust income.

In the *Glendinning* case (and also in the *Alsop* case), although the former wives had remarried, a fact which would ordinarily have ended the obligations of the first husband, they continued to be liable because their guaranty of fixed incomes to their divorced wives was not conditioned on the latter remaining single.

In *Thomas* v. *Commissioner*, 100 F. (2d) 408, decided by the Second Circuit on December 5, 1938, the divorced husband had set up a trust to pay the net income to his former wife for life. He had contracted with her to pay her a fixed amount per annum "so long as they both shall live", such amount to be reduced by the amount of trust income received by her. By virtue of this contract, he remained legally

obligated to her and such obligation was satisfied *pro tanto*, from time to time, by the distribution of trust income to her. Moreover, the matrimonial domicile of the parties was Florida, in which state the divorce was secured and, under the law of Florida, Thomas remained liable for the support of his former wife, despite the provision of the divorce decree or any agreement to the contrary, all of which the divorce court had the power to modify at any time on application of either party. It was clear, therefore, and was conceded by both parties, that so long as Thomas lived the trust income was taxable to him. Thomas having died in 1926, the question in the case was whether the trust income for 1930 was taxable to Thomas' estate or to his former wife.

The Board had held that the trust income after Thomas' death was taxable to his former wife, basing its decision squarely on the proposition that the *Douglas* case was not applicable since all liability of Thomas to his wife had ceased upon his death (Commerce Clearing House B. T. A. Service, Dec. No. 9950-A). The Second Circuit affirmed unanimously. Although the court did not base its affirmance squarely on the fact that Thomas' liability had ended prior to the tax year, the majority of the court referred to their own decision in the *Harry Blumenthal* case as authority for such a holding, and intimated that they would have based the affirmance on that ground had it not been for their assumption that "the opposite result was reached" by the Third Circuit in the *Glendinning* case. The Court's assumption as to the *Glendinning* case was incorrect; we already have shown that there is no conflict between the *Glendinning* case and the *Harry Blumenthal* case, but that the two cases are distinguishable on their facts, since in

the *Harry Blumenthal* case the taxpayer's liability to support his former wife did actually cease upon her remarriage whereas in the *Glendinning* case the taxpayer's liability did not cease upon his former wife's remarriage because he had contractually obligated himself to pay her fixed annual amounts so long as she should live.

(c) Decisions of the Board of Tax Appeals.

The Board of Tax Appeals has not been as consistent as the Courts.

Prior to this Court's decision in *Douglas* v. *Willcuts*, the Board of Tax Appeals laid down the correct rule in a number of decisions, distinguishing between trusts under which the divorced wife was nothing but a life beneficiary entitled to trust income and cases in which the husband remained legally obligated to her in a fixed amount per annum or in gross and the trust was created merely as security for the performance of that continuing obligation.[2]

Since the decision in *Douglas* v. *Willcuts*, the Board has held the divorced husband taxable on the income of a trust created for the benefit of his former wife in a number of cases, in some of which the husband was under a continuing obligation to pay his wife a stated amount per annum,[3] and in others of which the husband remained liable, under the statutes of the domicile, to support his former wife even after

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[2] *Welch* v. *Commissioner*, 12 B. T. A. 890; *Lynch* v. *Commissioner*, 23 B. T. A. 435; *Turner* v. *Commissioner*, 28 B. T. A. 91, aff'd *per curiam* 71 F. (2d) 1018 (C. C. A. 2); *Longyear* v. *Commissioner*, 28 B. T. A. 1086, aff'd 77 F. (2d) 116 (D. C. Ct. App.).

[3] *Tilles* v. *Commissioner*, 38 B. T. A. 545; *Weir* v. *Commis-

divorce.[4] In the *Tuttle*, *Harry Blumenthal* and *Thomas* cases, referred to above, and in other cases,[5] the Board has held the divorced husband not taxable on the trust income, where it appeared that under the agreement with his former wife his liability to her had been cut off, prior to the tax year, by the divorce, the wife's remarriage, or the husband's death.

On the other hand, in the instant case, in the *Leonard* and *Fuller* cases, referred to above, in *Hogan v. Commissioner*, 35 B. T. A. 26, *Higginson v. Commissioner* (unreported—C. C. H. Dec. No. 10546-D), *Nichols v. Commissioner* (unreported—C. C. H. Dec. No. 10739-D) and *Metcalf v. Commissioner*, 40 B. T. A. 177 (on appeal to C. C. A. 2), the Board held the husband taxable, although all liability to his former wife had been terminated prior to the tax year, apparently on the ground that he had been liable to support his wife before divorce and might have been subjected to an obligation for alimony if he had not created the trust.

III.

After the divorce, there remained no continuing liability on the husband for support, either by contract or by decree or by Iowa law.

The parties intended the settlement and lump sum payments agreed on at the time of the divorce to

[4] *Whitaker v. Commissioner*, 33 B. T. A. 865 and *Goldring v. Commissioner*, 36 B. T. A. 779.

[5] *Rea v. Commissioner*, 35 B. T. A. 1132 and *Barry v. Commissioner*, an unreported memorandum decision published in Commerce Clearing House Board of Tax Appeals Service as Dec. No. 9751-L. See also *Hall v. Commissioner*

settle finally all obligations of the husband for alimony or for the wife's support. The decree confirming the arrangement so characterizes it and in effect is an adjudication that his liability is at an end. There was no covenant of the husband in effect during the tax year guaranteeing the amount of the trust income payable to the divorced wife.

It only remains to inquire whether it was competent under Iowa law to make such a settlement, and whether under Iowa law there remained any power in the courts to revise the arrangement and compel the respondent to provide support. Iowa has no statute such as is found in some jurisdictions providing that a man is legally obligated to support his wife even after divorce and that any agreement between divorced husband and wife for her support is always subject to revision by the courts.

In the absence of such a statute, it is not against public policy for husband and wife to make such final settlements by agreement. Such adjustment of property rights by agreement rather than litigation is favored. *Chambers v. Porter*, 183 N. W. 431 (Iowa, not officially reported); *Cowle v. Cowle*, 114 Kan. 605; *Burnett v. Paine*, 62 Me. 122; *Palmer v. Fagerlin*, 163 Mich. 345.

Under the statutes and decisions of Iowa no power remained in its courts to revise this settlement, or require the husband to make any further contribution. Furthermore, the decree in the divorce case is in effect an adjudication binding on the parties that the husband is forever discharged. Even if there were laws in Iowa to the effect that the husband should not be finally discharged from liability, the

decree would nevertheless be binding on the parties. In that case it might have been erroneous, but not void. *Freuler* v. *Helvering*, 291 U. S. 35; *Blair* v. *Commissioner*, 300 U. S. 5, citing with approval *Hubbell* v. *Helvering*, 70 F. (2d) 668 (C. C. A. 8th).

The statute of Iowa reserving jurisdiction to divorce courts to make subsequent changes in their orders relating to children, property, parties and maintenance, relates to orders which are of a nature not final.

Where there is a final division of property and an agreement intended as a complete discharge of the husband's obligations and confirmed as such by the court, there is no power in the courts thereafter to alter it. The Circuit Court of Appeals reviewed the Iowa law and reached that conclusion, and its conclusion as to local law carries weight. *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 74.

The Code of Iowa contains the following provision with reference to alimony, custody of children and subsequent changes:

> "Sec. 10481. **Alimony-custody of children-changes.** When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.
>
> Subsequent changes may be made by it in these respects when circumstances render them expedient. [C51, Sec. 1485; R60, Sec. 2537; C73, Sec. 2229; C97, Sec. 3180; C24, 27, 31, Sec. 10481.]"

The foregoing provision has always been in the statutory law of Iowa. It was first adopted in its present form in the Iowa Code of 1851. Even before

statehood, the Iowa Territorial legislature had adopted a similar provision, at its first session, 1838-39. The provision has been the subject of an abundance of judicial interpretation and discussion by the Iowa Supreme Court and there is not the slightest doubt concerning its meaning and effect.

The Supreme Court of Iowa has held repeatedly that this provision does not, upon divorce, preclude final adjudications between a husband and wife respecting their property. It is only when minor children are involved or an order has been made requiring the husband to make future payments to support the wife that subsequent changes in the divorce decree can be made. In all other cases divorce decrees constitute final adjudications the same as judgments in other kinds of litigation. *Kraft* v. *Kraft*, 193 Iowa 602; *Duvall* v. *Duvall*, 215 Iowa 24.

Three general rules applicable under Section 10481 of the Iowa Code have been laid down by the Iowa Supreme Court. They are (1) where provision has been made in the original decree for the custody of minors or for the continued support and maintenance of the wife, the court retains jurisdiction to modify such provision; (2) where no alimony or maintenance and support is allowed the wife in the original decree, the court has no power subsequently to modify the decree so as to allow the same; (3) where alimony is allowed in a lump sum, or a settlement of property rights made by the parties is ratified by the decree, the court has no power to modify the allowance.

In every case in which the Supreme Court of Iowa has allowed a modification of a divorce decree, the custody and support of minor children were involved

or a provision for continued future payments by the husband for the maintenance of the wife was contained in the original decree and a showing was made that changed conditions warranted the modification. In such cases the court has retained jurisdiction to modify the decree under the statute. *Franklin* v. *Bonner,* 201 Iowa 516; *Wilde* v. *Wilde*, 36 Iowa 319; *Andrews* v. *Andrews*, 15 Iowa 423; *Handsaker* v. *Handsaker*, 223 Iowa 462; *Morrison* v. *Morrison*, 208 Iowa 1384; *Toney* v. *Toney*, 213 Iowa 398; *Boquette* v. *Boquette*, 215 Iowa 990; *Junger* v. *Junger*, 215 Iowa 636; *Nicolls* v. *Nicolls*, 211 Iowa 1193; *Kirk* v. *Kirk*, 222 Iowa 945; *Durall* v. *Durall*, 215 Iowa 24.

In *Durall* v. *Durall, supra,* one of the more recent Iowa cases, the former wife filed a petition for modification of a divorce decree asking alimony for herself and a monthly allowance for the support of a minor child and also asking an allowance for attorneys' fees. The Supreme Court denied further alimony to the wife but ordered a trial on the amount necessary to support the minor child. There was no question concerning the court's retained jurisdiction to modify with respect to support for the child. However, on the question of modification regarding alimony to the former wife, the court had no retained jurisdiction. As in the case at bar, the parties had made a settlement of the property interests which was recognized in the decree.

In every instance where the decree of divorce failed to provide for alimony the court held that there had been a final adjudication of the property rights and it had lost jurisdiction to make subsequent changes. *Spain* v. *Spain*, 177 Iowa 249; *McCoy* v. *McCoy*, 191 Iowa 973; *Durall* v. *Durall, supra.* In *Spain* v.

Spain, supra, the wife was granted a divorce and the custody of a minor son. No mention was made of alimony in the decree or support for the child, the wife admitting that at the time of the decree the husband had no means. Subsequently she made application for a modification of the decree on the ground that her former husband's financial condition had improved. The court refused to modify so as to award her alimony, on the ground that there had been a final adjudication.

In *McCoy* v. *McCoy, supra,* suit was brought by plaintiff against her former husband, asking a decree for alimony supplementary to her decree of divorce obtained by her in Arkansas, wherein no alimony was allowed. She also prayed an allowance for the support of a minor child of the marriage. Upon motion of the defendant, the allegations of the petition upon which plaintiff predicated her claim for allowance of alimony to herself were stricken. Plaintiff appealed. Decision was affirmed. The court held: "That the severance of the marriage relation by absolute decree without alimony terminates the right to alimony."

There has never been a decision of the Supreme Court of Iowa in which modification of a lump sum award of alimony in a divorce decree has been allowed. Time and again the Iowa Supreme Court has said, "A decree of divorce settles the property rights" (*Carr* v. *Carr,* 185 Iowa 1205); alimony "can only be allowed where the marriage relation exists" (*McCoy* v. *McCoy, supra*); and "in this country, and *especially in this state*, a divorce absolutely dissolves the marriage status, and the duty of support no longer exists". *Kraft* v. *Kraft, supra.* See also *Spain* v.

Spain, supra; Patton v. *Loughridge*, 49 Iowa 218; *Baird* v. *Connell*, 121 Iowa 278, and other cases cited in these cases. In view of the often repeated pronouncements of the Iowa Supreme Court it may not lightly be assumed as in petitioner's brief, pages 20, 21, that an unqualified power to modify a divorce decree exists in Iowa. Such power is strictly limited under all the Iowa decisions. In *Barish* v. *Barish*, 190 Iowa 493, the Iowa Supreme Court denied modification of a lump sum alimony award. In that case the decree gave the wife $1,500 alimony, care and custody of a minor child and allowance of $20 per month for its support and maintenance. Subsequently she applied for a modification asking an increase in her alimony allowance. The trial court declined to make any modification except to increase the allowance for support of the child to $30 per month. The Supreme Court increased the allowance for support of the child to $50 per month but did not increase the lump sum payment of $1,500. In a separate concurring opinion, Judge Salinger poses the question: "Does our statute give power to modify an allowance of gross or permanent alimony?" After a review of the decisions he concludes that it does not and points out that permanent or gross alimony is different from an allowance for continuing support which may be changed.

The subsequent case of *Kraft* v. *Kraft, supra*, confirms *Barish* v. *Barish, supra*. On May 20, 1920 defendant filed her third application asking the court to direct plaintiff to pay $548.66, as an increase in alimony and support for herself and the minor son of the parties and for attorneys' fees. After a trial the court granted the order in the amount of one-half of the sums asked, and decreed that said sum

be distributed by paying each one of the persons holding bills one-half of their claims, and provided that the parties holding such bills should receipt in full, so far as any liability of the plaintiff on said accounts was concerned. The order further provided that this was for the support of defendant and the minor son, and was in addition to the amount of alimony awarded in the original cause and the two prior modifications; that this was made necessary by the increased cost of living since the original decree; plaintiff appealed and the Supreme Court reversed.

The original decree awarded the wife $4,000 to be paid within six months or in lieu thereof the husband could elect to pay 5% of said amount, *i. e.*, $200 a year. This he elected to do. It was contended by appellant that, by the original decree, appellee was awarded a lump sum as alimony, and that this amounts to a division of the estate. Appellee contended that the entire amount awarded as alimony, including the $4,000 is for her support. However, the court said at page 607:

> "The effect of the decree was, we think, so far as defendant is concerned, to award her a lump sum out of her husband's estate. We held, in *Spain v. Spain*, 177 Iowa 249, that the court has no inherent power to modify a decree of divorce as regards alimony—no power to so modify, except for such fraud or mistake as would justify a modification or change of any judgment; and *that a decree of divorce silent as to any alimony cannot thereafter be so modified as to provide for alimony*, even though there is a showing of change in financial condition. In the course of the opinion in the *Spain* case, the court said that, at common law, and under

ecclesiastical procedure, courts entertained such an action because there was no such thing as an absolute divorce; that the divorce was from bed and board, and little more than a legalized separation, with the duty of the divorced husband to support his wife after divorce; and further, that, in this country and especially in this state, a divorce absolutely dissolves the marriage status, and the duty of support no longer exists. Alimony is allowed in such cases in lieu of dower and prior duty to support, and there can be no review of the decree awarding it, or refusing, denying, or failing to award it, save for such fraud or mistake as would authorize the setting aside or modification of any decree. * * *.

"We are inclined to the view that, where alimony is allowed in a lump sum, as permanent alimony, or there is a division of the real property of the parties, as permanent alimony, the statute does not authorize a change therein, except for such reasons which would justify the setting aside or changing of a decree in any other case; that the party awarded permanent alimony is not entitled to permanent alimony and support both, as claimed by the defendant in the instant case." (Italics ours.)

The foregoing cases stand unchallenged and they are therefore the law of Iowa. The criticism of the *Kraft* case on pages 22 and 23 of petitioner's brief is unwarranted. An increase of allowance for support of the minor son (p. 606) was denied on the ground that there was "no evidence to show that there had been any material change in conditions". Allowance of any further sum to the wife was denied squarely on the ground that the lump sum award

in the original decree precluded a modification. This was no mere dicta as asserted in petitioner's brief. The decision is in harmony with *Barish* v. *Barish*, and it does not conflict with nor purport to overrule any of the Iowa cases dealing with the modification of divorce decrees. The two prior orders referred to in petitioner's brief (p. 23), were adjudications of the lower court which had not been appealed, and there is therefore no inconsistency in the decision.

In contending that "The Iowa court accepted the trust as marking out the *extent* of the husband's duty of support" (Brief, p. 8); that "The decree of the Iowa court confirms and embodies the husband's obligation to devote the income * * * to the use of his wife" (Brief, p. 11); that "In adopting the trust, the Iowa court simply ruled in substance that the obligation was coextensive with the terms of the trust" (Brief, p. 13); and that "The only difference between this case and *Douglas* v. *Willcuts*, is the *extent* of the obligation rather than the *existence* of the obligation" (Brief, p. 16), the petitioner ignores the existence of two distinct legal ideas: *First*, a decree of absolute divorce in Iowa terminates the duty of further support, such duty being an incident of the marriage relation. *Second*, the trust here does not create any continuing obligation in lieu of the former duty of support, but it must be found, if at all, (1) in the divorce decree itself, (2) in the laws of the domicile, or (3) in an agreement collateral to the trust. All three of these elements were present in *Douglas* v. *Willcuts*. None of them are present in the instant case.

In *Durall* v. *Durall, supra*, the Iowa Supreme Court held that the trial court was without power to modify a divorce decree so as to award a former wife alimony where the parties had settled their property rights without the aid of the court and where such settlement, as in the case at bar, had been approved by the court. The divorce terminated the duty to further support.

In *Carr* v. *Carr, supra*, cited by the court below, the court said, with respect to a trust which was embodied in a divorce decree: "Ordinarily a decree of divorce settles the property rights and interest of the parties in the property rights of each other".

In the instant case as in *Durall* v. *Durall*, there was a confirmation in the decree of the settlement made out of court. Furthermore, the settlement was a lump sum settlement, as hereinbefore pointed out and as described by the court below and hence it falls squarely under the decisions of *Barish* v. *Barish, supra*, and *Kraft* v. *Kraft, supra*. The son Lucius W. Fitch, born March 27, 1906 (R. 19) had attained his majority six years prior to the income tax year 1933, and no question of continuing liability for support of minor children is involved. As the court below correctly concluded, the right to further alimony was absolutely precluded by the decree of divorce which dissolved the marriage status and hence removed the duty or obligation of the respondent further to support his former wife. The property settlement and divorce decree achieved finality and thereafter neither F. W. Fitch nor his former wife Lettie S. Fitch, could claim any property or support from the other, regardless of any change in the circum-

stances or conditions of either. The law of Iowa on the subject as found by the court below and as laid down in the cases is not open to dispute.

Conclusion.

The conclusion must be that the Court below was right; that the various Circuit Courts of Appeals have correctly interpreted the decision in *Douglas* v. *Willcuts;* that the income of this trust was not applied to discharge any existing liability of the respondent, nor for his benefit; and that it was not his constructively or otherwise.

The judgment should be affirmed.

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APPENDIX.

Provisions of Revenue Act of 1932 Governing the Taxation of Trust Income.

SEC. 161. IMPOSITION OF TAX.

(a) **Application of Tax.**—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) **Computation and Payment.**—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in Section 166 (relating to revocable trusts) and Section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see Section 142.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed

in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by Section 23(n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in Section 23(n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under Subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income

of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

SEC. 166. REVOCABLE TRUSTS.

Where at any time during the taxable year the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in Section 23(n), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question".

(5122)

SUPREME COURT OF THE UNITED STATES.

No. 243.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* F. W. Fitch.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 29, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner claimed that an amount of $7,128 distributed in 1933 under a so-called alimony trust to respondent's divorced wife should have been included in respondent's taxable income for that year. The Board of Tax Appeals agreed and found a deficiency (37 B. T. A. 1330). The Circuit Court of Appeals reversed, one judge dissenting, 103 F. (2d) 702. We granted certiorari because of the asserted failure of that court correctly to apply the principle involved in *Douglas* v. *Willcuts*, 296 U. S. 1.

The so-called alimony trust in question was created a few years before the divorce, while respondent and his wife were separated, and in settlement of a suit brought by her for separate maintenance. Certain premises (a hair tonic factory and a long term lease thereon) were transferred to a trustee to hold title, collect rents and after deduction of expenses to pay the wife $600 a month during her life and the balance to respondent for his life.[1] On the death of either respondent or his wife the deceased's share of the income was to be paid to their children.[2] The trust was to continue at least

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[1] Respondent and his wife separated in 1917. In 1919 respondent purchased a home for his wife, furnished it for her, and gave her an automobile. In the same year F. W. Fitch Co. was incorporated and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1860 were issued to respondent and 10 to his wife. She was also an officer and director of the company, with a monthly salary of $300.

When the separate maintenance suit was settled in 1923, respondent leased certain premises, owned by him, to the F. W. Fitch Co. for 99 years, at an annual rental of $12,000. These premises and that lease were transferred to the trustee. Upon creation of the trust the wife ceased to be an officer and director of F. W. Fitch Co. and received no further salary from it.

[2] No question of minor children is here involved, the youngest of the four children having become of age in 1927.

fifteen years. On the death of both respondent and his wife the principal was to be paid over to their children. The trust was irrevocable. And while respondent covenanted to pay off certain encumbrances on the trust property, he did not underwrite in whole or in part the $600 monthly payments to his wife.

In 1925 she filed suit for a divorce in an Iowa court. A property settlement was agreed upon which included the trust agreement and, in addition, provided for a transfer to her by respondent of certain shares of stock and cash.[3] The divorce decree confirmed the property and alimony settlement.[4]

The general rule is clear. "Amounts paid to a divorced wife under a decree for alimony are not regarded as income of the wife but as paid in discharge of the general obligation to support, which is made specific by the decree". *Douglas* v. *Willcuts, supra,* p. 8. It is plain that there the alimony trust, which was approved by the divorce decree, was merely security for a continuing obligation of the taxpayer to support his divorced wife. That was made evident not only by his agreement to make up any deficiencies in the $15,000 annual sum to be paid her under the trust. It was also confirmed by the power of the Minnesota divorce court subsequently to alter and revise its decree and the provisions made therein for the wife's benefit. Likewise consistent with the use of the alimony trust as a security device was the provision that on death of the divorced wife the corpus of the trust was to be transferred back to the taxpayer. Respondent insists that in the instant case there is no continuing obligation to which the income of the alimony trust is applied but rather that the property and alimony settlement approved by the Iowa court effected an absolute discharge of any duty or obligation on his part to support his divorced wife. It is true that there is no covenant or guarantee to make up any deficiency in the monthly payment to his divorced wife, as there was in the *Douglas* case. And unlike that alimony trust, the instant one, though granting the

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3 600 shares of stock of F. W. Fitch Co. and $23,500.

4 "It is, Therefore, Ordered, Adjudged and Decreed, that the plaintiff, Lettie S. Fitch, be, and she is hereby, divorced from the defendant, Fred W. Fitch, absolutely; . . . that the trust agreement which is referred to in the defendant's answer as having been entered into between these parties on or about the 23rd day of April, 1923 . . . be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court."

taxpayer a participation in the income, irrevocably alienates the corpus. Other indicia of the use of this alimony trust as a security device for any continuing obligation of respondent are alleged to be absent by reason of the lack of power in the Iowa court to modify the decree confirming the property and alimony settlement.

The Iowa statute provides: "When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right. Subsequent changes may be made by it in these respects when circumstances render them expedient."[5]

Admittedly the court under that statute has the power to modify provisions in the original decree for the continued support and maintenance of the wife.[6] And it likewise seems well settled by a long line of Iowa cases that where the original decree makes no provision for alimony, there is no power subsequently to modify the decree so as to provide it.[7] And, respondent contends, where alimony is allowed in a lump sum or a property settlement is ratified by the decree, the court retains no power to modify.

Spain v. *Spain*, 177 Ia. 249, and *McCoy* v. *McCoy*, 191 Ia. 973, on which respondent and the Circuit Court of Appeals place reliance are not in point since those divorce decrees, unlike the instant one, made no provision for alimony. In *Spain* v. *Spain*, *supra*, the Supreme Court of Iowa specifically reserved the question of the power to modify a divorce decree involving a property settlement. As to that it said (pp. 260-261): "As to an award in gross, or a division of the property, based upon an equitable apportionment of the property of either of the parties at the time the divorce is granted, we have no occasion to speak, for that matter is not in the case."

Likewise *Barish* v. *Barish*, 190 Ia. 493, cited below and urged here in support of respondent's contention, is of little aid, for in spite of a strong concurring opinion that the court had no power to modify an allowance of "gross" or "permanent" alimony, the majority ap-

[5] Sec. 10481, Iowa Code.

[6] See Corl *v.* Corl, 217 Ia. 812; Junger *v.* Junger, 215 Ia. 836; Boquette *v.* Boquette, 215 Ia. 990; Toney *v.* Toney, 213 Ia. 398; Morrison *v.* Morrison, 208 Ia. 1384.

[7] Spain *v.* Spain, 177 Ia. 249; McCoy *v.* McCoy, 191 Ia. 973; Handsaker *v.* Handsaker, 223 Ia. 462; Duvall *v.* Duvall, 215 Ia. 24; Doekson *v.* Doekson, 202 Ia. 489.

plied the statute and concluded (p. 501) "Whatever the extent of the power of the court may be to make such increase, it is always slow to exercise such power, except in the presence of extraordinary circumstances, such as are not present here." To be sure, there is the following strong statement in *Kraft* v. *Kraft*, 193 Ia. 602, 607: "We are inclined to the view that, where alimony is allowed in a lump sum, as permanent alimony, or where there is a division of the real property of the parties, as permanent alimony, the statute does not authorize a change therein, except for such reasons as would justify the setting aside or changing of a decree in any other case; that the party awarded permanent alimony is not entitled to permanent alimony and support both . . . ." And in *Carr* v. *Carr*, 185 Ia. 1205, that court stated, p. 1211: "Alimony is allowed in lieu of dower and the prior duty of support, and a review of the decree awarding or refusing same can be had only for such fraud or mistake as would authorize the setting aside or modification of any other decree." In that case the divorce decree required the husband, *inter alia*, to convey certain real estate to a trustee for the exclusive benefit of the wife to be held in trust for five years, during which time the income was to be paid over to the wife and at the end thereof the trustee, on demand, was to convey the property to her. Meanwhile, the trustee had the power to sell the property at not less than $100 an acre. Shortly before the expiration of the five-year period, the divorced husband filed a cross-petition in the divorce suit asking for a modification of the trust in order to protect his former wife from her own extravagance and her inexperience in business affairs. Apparently the relief asked was not based on the Iowa statute giving the court power to make subsequent changes in the divorce decree "when circumstances render them expedient". For the court stated that the modification of the decree was sought on the grounds (1) that the donor of the trust was entitled to have it carried out in accordance with its terms and the real purpose for which it was created; and (2) that, in the alternative, he was entitled to have a guardian of the property appointed.

However that may be, much of the weight which respondent accords *Kraft* v. *Kraft* and *Carr* v. *Carr*, *supra*, seems to have been dissipated by *McNary* v. *McNary*, 206 Ia. 942. In that case the Su-

preme Court of Iowa had squarely before it the question of whether or not under the foregoing statute a decree of permanent alimony awarding personal and real property to the wife could be altered. The court after stating that it knew of no case where such a decree had been subsequently modified, added (p. 946): "This question is not argued by the parties, and we find it unnecessary to make a pronouncement thereon." And, significantly, it proceeded to apply the statute and finding that its conditions had not been satisfied, it denied the relief asked by the divorced husband.

On this state of the Iowa authorities we can only speculate as to the power of the Iowa court to modify alimony awarded in a lump sum or a property settlement ratified by a divorce decree. To be sure, *Kraft* v. *Kraft, supra,* involved some features common to the instant case, since the wife was to receive the income of $4,000 to be placed in trust by the husband or, until he placed it in trust, 5 per cent on that amount. But the refusal to modify that decree was not placed squarely, or even largely, on the lack of power to do so but on other circumstances. Furthermore, the uncertainty created by *McNary* v. *McNary, supra,* makes perhaps for even greater uncertainty where an alimony trust of the kind here involved is concerned. At least respondent has not established a necessary identity in treatment of transfers of personal or real property on the one hand and allowance of income out of this kind of alimony trust on the other. Even on the authority of *Kraft* v. *Kraft, supra,* respondent has not clearly shown that in Iowa divorce law the court has lost all jurisdiction to alter or revise the amount of income payable to the wife from an enterprise which has been placed in trust. For all that we know it might retain the power to reallocate the income from that property even though it lacked the power to add to or subtract from the corpus or to tap other sources of income.[8] If it did have such power, then it could be said that a decree approving an alimony trust of the kind here involved merely placed upon the preexisting duty of the husband a particular and specified sanction. In that event, the case would be little different from one where the husband was directed to make specified payments to the divorced wife. And we see no reason why the rule of *Douglas* v. *Willcuts, supra,* should not then apply.

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[8] Cf. Shaw v. Shaw, 59 Ill. App. 268.

Enough has been said to show that respondent has not sustained the burden of establishing that his case falls outside the general rule expressed in *Douglas* v. *Willcuts, supra.* If we were to conclude that this case is an exception to that rule we would be acting largely on conjecture as to Iowa law. That we cannot do. For if such a result is to obtain, it must be bottomed on clear and convincing proof, and not on mere inferences and vague conjectures, that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent. Only in that event can income to the wife from an alimony trust be treated under the revenue acts the same as income accruing from property after a debtor has transferred that property to his creditor in full satisfaction of his obligation—unless of course Congress decides otherwise.

The judgment of the Circuit Court of Appeals is

Reversed.

Mr. Justice Reed concurs in the result.

Mr. Justice McReynolds is of the opinion that the judgment below should be affirmed.

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